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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. 551.

GEORGE CARROLL AND JOHN KIRO, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 5, 1923.

(29,131)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

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vs.

THE UNITED STATES.

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1 The President of the United States of America to the Marshal of the United States for the Western District of Michigan and to his deputies or any or either of them:

Whereas, Arthur Q. Scully has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the Western District of Michigan Division charging that George Carrol and John Kiro late of Kent County, in the State of Michigan did, on or about the 15th day of December, A. D. 1921, at Grand Rapids in said District, in violation of Nat'l Prohibition Act of the Revised Statutes of the United States, unlawfully transport and possess intoxicating liquor and conspire to violate National Prohibition Act contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said George Carrol and John Kiro wherever found in your District and bring their bodies forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said complaint, that *he* may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 16th day of Dec., A. D. 1921. Oscar E. Waer, United States Commissioner as Aforesaid.

Approved. —— ——, United States Attorney — District of ——.

Return.

Received this Warrant on the 16th day of December, 1921, at Grand Rapids and executed the same by arresting the within named George Carrol, John Kiro at Grand Rapids on the 16 day of Dec., 1921, and have *his body* now in court, as within I am commanded. Herman O'Connor, U. S. Marshal, West District of Mich., per Dan Hanley, Deputy. 16 day of Dec., 1921.

2 **Report of Proceedings Before Commissioner.**

In this matter the attorney for the respondents not only filed with the Commissioner a petition to return the property which is hereto attached, but also raised certain legal questions upon the hearing before the Commissioner.

The only testimony before the Commissioner was that of Arthur Q. Scully, Special Prohibition Agent, who testified that the respondents were apprehended on the public highway and their automobile searched, whereupon the whiskey which the respondents are charged with having possessed and transported was discovered. The witness stated that when the respondents were met upon the highway by the prohibition officers, the prohibition officers were not on the look-out for the respondents and had no reason to believe that the respond-

ents were transporting liquor. The prohibition officers, however, stopped the respondents and upon searching their automobile, found concealed in the cushions and other portions of the car a large quantity of bonded whiskey.

There is no claim that the officers had any search warrant, and at the conclusion of the proofs, the attorney for the respondents moved their discharge on the ground that the search was illegal and that being illegal, the whiskey which was found was no proper evidence of the commission of the offense, and the knowledge gained by the officers in making the unlawful search could not be used as evidence against the respondents.

The commissioner denied the motion of the attorney for the respondents to dismiss the case on the ground that the National Prohibition Act was sufficiently broad to authorize the search which was made in this case. Oscar E. Waer, United States Commissioner.

3 UNITED STATES OF AMERICA:

The District Court of the United States for the Western District of Michigan, Southern Division, June Term, A. D. 1922.

WESTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

Indictment.

Filed June 10, 1922.

The Grand Jurors of the United States, duly selected, impaneled and sworn to inquire in and for the Southern Division of the Western District of Michigan, upon their oaths do present and say:

Count 1.

That heretofore and on or about, to-wit, the 15th day of December, A. D. 1921, at, to-wit, the County of Kent, in the State of Michigan, in said division of said district and within the jurisdiction of this Court, George Carrol and John Kiro, then and there unlawfully did transport, namely, over and upon highways of the County of Kent, in said division and district, in an automobile, to-wit, an Oldsmobile Roadster, Michigan License No. 314-413, Motor No. 104424, certain intoxicating liquor, namely, spirituous liquor, to-wit, 68 quarts, more or less, of Bonded whiskey, so-called, which said liquor then and there contained one half of one per centum and more of alcohol by volume, and then and there was fit for use for beverage purposes, which said transportation then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count 2.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say, that heretofore and on or about, to-wit, the 15th day of December, A. D. 1921, at the place and within
4 the jurisdiction aforesaid, said George Carrol and John Kiro, then and there unlawfully did possess certain intoxicating liquor, namely, spirituous liquor, to-wit, 68 quarts, more or less, of Bonded whiskey, so-called, which said liquor then and there contained one half of one per centum and more of alcohol by volume and then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. Edward J. Bowman, United States Attorney.

Endorsed: The United States of America vs. George Carrol, John Kiro. Indictment. Transportation and Possession Bonded Whiskey. Viol. Nat. Pro. Act. A True Bill. C. M. M. Cushway, Foreman.

[Endorsement omitted.]

5 [Title omitted.]

UNITED STATES

vs.

GEORGE CARROLL.

Petition to Return Property.

WESTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

Now comes the defendant, and states that he is a resident of the City of Detroit, State of Michigan; that on the 15th day of December, 1921, certain officers of the United States, whose names are to this defendant unknown, unlawfully and without warrant so to do, seized certain property belonging to him viz., one Oldsmobile Roadster Automobile and seventy-three quart bottles of liquor and other property, from said defendant; that said search and seizure was made in violation of the fourth and fifth amendments to the Constitution of the United States; that the said officers, on or about the same day, delivered all of said property to the District Attorney for the Western District of Michigan, the Collector of Internal Revenue, Revenue Agent, United States Marshal and Clerk of this Court, and the Agent of the Department of Justice and Prohibition Agent, and that said officers still have said property in their possession, and have

failed and refused to return to the said defendant the same,
6 or any portion thereof; that said property is now being unlawfully and improperly held by said officers, in violation of defendant's rights under the fourth and fifth Amendments to the Constitution of the United States and the Constitution of the State of Michigan; that said District Attorney proposes to use said property at the trial of the above entitled cause, as evidence against said defendant, by reason whereof, and the facts above set forth, defendant's rights under the Amendments aforesaid, and under the Constitution of the State of Michigan, have been and will be violated, unless this Court orders the return herein prayed.

Defendant further says that he is informed and believes that the officers of the United States who made said search and seizure as aforesaid, were not looking for the said defendant at the time, and had no information sufficient to cause them to believe that defendant was on the road, or that said car contained any liquor whatsoever; that the said officers passed defendant, and after proceeding for about a mile, turned about and came up to them again, and stopped the defendant, searched him and said car, and at first found nothing, either on the person of said defendant, or in said car; that just as they were about to release defendant, one of said officers found a bottle underneath the back cushion by tearing the same, and thereupon a further search was made, and the remainder of the bottles found; that said facts, or some of them, will be found in the Commissioner's return, filed in said cause, to which reference is hereby expressly made, and that no warrant was issued in said cause until the day following the search and seizure, as above set forth.

Wherefore defendant prays that the said District Attorney, Collector of Internal Revenue, Revenue Agent, District Court Clerk,
United States Marshal, Agent of the Department of Justice,
7 and Prohibition Agent be notified, and that the Court direct and order said officers to return all of said property to said defendant, and that said search and seizure be declared illegal and void. George Carroll.

Subscribed and sworn to before me, this 13 day of June, 1922. Ella M. Backus, Notary Public, Kent County, Michigan. My commission expires Mar. 13, 1925.

8 [Title omitted.]

UNITED STATES

vs.

JOHN KIRO.

Petition to Return Property.

Now comes the defendant, John Kiro, and states that he is a resident of the City of Muskegon, State of Michigan; that on the 15th day of December, 1921, certain officers of the United States, whose names are to this defendant unknown, unlawfully and without war-

rant so to do, seized certain property belonging to one George Carroll, viz, one Oldsmobile Roadster Automobile, and, to-wit, seventy-three quart bottles of liquor and other property from said George Carroll, while this defendant was in company with said George Carroll, and this defendant has been thereafter charged jointly with George Carroll with transporting and possessing intoxicating liquors, and conspiring to violate the national prohibition act.

That said search and seizure was made in violation of the fourth and fifth amendments to the Constitution of the United States; that the said officers, on or about the same day, delivered all of said property to the District Attorney for the Western District of Michigan, the Collector of Internal Revenue, Revenue Agent, United States Marshal, the Clerk of this Court, Agent of the Department of Justice, and Prohibition Agent, and that said officers still have
9 said property in their possession, and have failed and refused to return to the said George Carroll the same or any portion thereof; that said property is now being unlawfully and improperly held by said officers, in violation of defendant's rights under the fourth and fifth Amendments to the Constitution of the United States and the Constitution of the State of Michigan; that said District Attorney proposes to use said property at the trial of the above entitled cause, as evidence against said defendant, by reason whereof, and the facts above set forth, defendant's rights under the amendments aforesaid, and under the Constitution of the State of Michigan, have been and will be violated, unless this Court orders the return herein prayed.

Defendant further says that he is informed and believes that the officers of the United States who made said search and seizure as aforesaid, were not looking for the said defendant at the time, and had no information sufficient to cause them to believe that defendant was on the road, or that said car contained any liquor whatsoever; that the said officers passed defendant, and after proceeding for about a mile, turned about and came up to them again, and stopped the defendant, searched him and said car, and at first found nothing, either on the person of said defendant, or in said car; that just as they were about to release defendant, one of said officers found a bottle underneath the back cushion by tearing the same and thereupon a further search was made, and the remainder of the bottles found; that said facts, or some of them, will be found in the Commissioner's return, filed in said cause, to which reference is hereby expressly made, and that no warrant was issued in said cause until the day following the search and seizure, as above set forth.

Wherefore defendant prays that the said District Attorney, Collector of Internal Revenue, Revenue Agent, District Court
10 Clerk, United States Marshal, Agent of the Department of Justice, and Prohibition Agent be notified, and that the Court direct and order said officers to return all of said property to said George Carroll, and that said search and seizure be declared illegal and void. John Kiro.

Subscribed and sworn to before me, this 13 day of June, 1922. Ella M. Backus, Notary Public, Kent County, Michigan. My commission expires Mar. 13, 1925.

11 [Title omitted.]

Order Denying Motion to Suppress Evidence.

[Filed June 19, 1922.]

This cause came on to be heard upon the motion of the defendants to suppress the evidence procured by the United Sttaes under a search warrant and after argument, the motion was denied.

[Title omitted.]

Judgment.

[Filed June 27, 1922.]

The defendants having heretofore been convicted by the verdict of the jury and being now in court, it is found and adjudged that they are guilty as charged and that they each pay to the United States a fine of $500 within 5 days and that in default thereof they be imprisoned in the Kent County Jail until said fine is paid but not exceeding four months. Upon application of the defendant it is ordered that upon filing a supersedeas bond in the sum of $1,000 each with the usual conditions of such a bond and with sufficient sureties to be approved by the Clerk that proceedings herein be stayed for the period of 30 days to allow him to settle a bill of exceptions and sue out a writ of certiorari as he may be advised.

12 [Title omitted.]

Notice.

To Edward J. Bowman, United States District Attorney, Grand Rapids, Michigan.

SIR: Please take notice that attached hereto is a true copy of the proposed bill of exceptions in said cause which we will present to Hon. Clarence W. Sessions, District Judge, for settlement and signature, on the 19th day of July, 1922, at his office in the Federal Building, Grand Rapids, Michigan. Clare J. Hall, James A. Lombard, Thomas E. Atkinson, Attorneys for Respondents.

13 [Title omitted.]

Bill of Exceptions.

[Filed August 11, 1922.]

This cause came on to be heard before the Hon. Clarence W. Sessions, District Judge, and a jury, at the Federal Building, in the City of Grand Rapids, on Tuesday, the 20th day of June, 1922.

Appearances for the United States: Messrs. Roy M. Watkins and John Jones, Assistant District Attorneys.

Appearances for Respondents: Messrs. James A. Lombard and Thomas E. Atkinson.

Thereupon a jury was called, examined and sworn.

Mr. Lombard: If the Court please, at this time, for the purpose of saving the record, I want to renew the motion that was made and heard Monday. I don't know as I have anything more to say than I had then.

The Court: The motion will be denied and an exception noted.

14 ARTHUR SCULLY, a witness for the Government, being duly sworn, testified in substance as follows:

Direct examination.

By Mr. Jones:

My name is Arthur Scully. I am a Federal prohibition agent working under Fred Cronenwett. I have been associated in that work since two years last March. I am acquainted with the two respondents here. I first became acquainted with them in September, 1921. I saw them in December, 1921, on the road between here and Detroit, in Kent County, Michigan, in this district. Chief Cronenwett, Mr. Peterson, officer from the State Department of Public Safety, and Mr. Thayer, Federal prohibition agent, were with me. We four men were patrolling the road, looking for violators of the prohibition law. We were driving down the road toward Ionia, or toward Saranac, between Lowell and Saranac, and this Oldsmobile roadster passed us. We knew the car. We were going in the opposite direction and we passed it. We turned around and chased the car and finally stopped it. After we searched the car, we found liquor in the car. I had seen the car before. I found liquor in the back of the seat. There is only one seat. It was an Oldsmobile Roadster. The liquor was found right in the cushion part of the back seat, back of the seat. It was all in the back. We found sixty-eight quart bottles of whiskey and gin altogether, all the same size. The two men in the car were John Kiro and George Carroll, the respondents here. Mr. Peterson brought the liquor into Grand Rapids. The rest of the men stayed out on the road, patrolling. I saw the liquor afterwards, in the United States Marshal's office.

Two bottles marked Exhibits "A" and "B."

Exhibits "A" and "B" are two of the bottles taken out of
15 that car.

In September, 1921, the respondents were at my apartment. I knew them to see them before that. Both of respondents were at my apartment, 122 Oakes Street, in the City of Grand Rapids.

Q. And what, if any, in the way of anything in the way of talk or conversation went on between you and the two respondents at your apartments at that time?

Mr. Lombard: I object to that as incompetent, if Your Honor please. That was in September before this.

The Court: You may answer.

Mr. Lombard: Exception.

A. There wasn't any between myself and the two men. I overheard a conversation.

I didn't take part in the conversation. Mr. Cronenwett and the respondents did. The conversation that I heard was that they wanted to sell Mr. Cronenwett three cases of whiskey. Both respondents were present and took part in the conversation. I think $125 a case was the price set for the whiskey. I don't remember the exact price, but I know a price was set. They left and said they would be back in half an hour, with the whiskey. They came back and didn't bring it. There wasn't any conversation that I heard, when they came back; no reason why they didn't bring it that I heard. I had seen this car just twice before the 15th of December. On the particular night I mention in September and one day in October, October 6th, we were patrolling the road, and this car passed towards the direction of Detroit, and we followed the car to Lansing. We lost trace of them in Lansing and came back to Grand Rapids. I couldn't tell you just how the sixty-eight bottles in the back cushion of that seat of the roadster affected the cushion. I didn't ride in the car. I didn't help take the whiskey out of the car. I
16 didn't examine the particular manner in which the cushions were made.

Cross-examination.

By Mr. Lombard:

I didn't have any knowledge or intimation that this car was coming through at that time. I didn't have a search warrant with me for the purpose of searching this car.

Q. The fact simply is that when you passed this car, you suspected it might be carrying some liquor?

A. Yes, sir.

We went on a ways and turned around and followed it back towards Grand Rapids. We finally passed it and cut in ahead of it and stopped there. Mr. Cronenwett was the first person to go back to the car. I didn't go with him. I was driving. I remained

in the car I was driving in and Mr. Cronenwett was back to the Carroll car when I got there. I didn't have a gun with me.

Q. Did Mr. Cronenwett have a gun with him?

A. I didn't see it.

I didn't see him use it. I stopped my car right along side of the Carroll car, that is, my front wheels, I kind of cut the Carroll car off. I went far enough ahead so that the Carroll car had to stop. It is not a fact that one of us, whoever reached the car first, had a gun in his hand and presented it at these men. I didn't see any gun used there. I didn't have one with me. I couldn't say whether Mr. Cronenwett had a gun with him. I didn't see it. Mr. Kiro was driving the car. I don't know who owns the car. I saw it twice before. I am sure of that. I identify having seen it before by the license number and by it being an Oldsmobile Roadster.
17 That is the only way I identify it. I never searched it before. We found the goods in the cushion, or in the upholstery. We took the car and brought it in. They were arrested at that time and brought in also.

Redirect examination.

By Mr. Jones:

At the time these men were at my apartment and tried to sell Cronenwett the three cases of whiskey, they had the same car with them. At the time the car was searched on the 15th of December, there was some conversation between the officers and defendant Carroll. Carroll said to take the whiskey, and when he said that, he put his hand in his pocket and pulled out some bills and he said to take the whiskey and I will make it right. He said that to Mr. Cronenwett. I don't know how much money he had in his hand.

Recross-examination.

By Mr. Lombard:

That was Mr. Carroll. The conversaion in my apartment took place between eight and nine in the evening, in September. Mr. Cronenwett was seeking to purchase some liquor then.

Q. And do you know whether he had solicited Mr. Carroll to get some for him?

A. He was to buy it from Mr. Carroll and Mr. Kiro.

He had conversation with both of them; they were both talking. I heard Mr. Kiro say something about getting liquor for Mr. Cronenwett. I heard Mr. Kiro say they had to go out to Fulton Street to get it. They did not bring or get any liquor.

18 WALTER A. PETERSEN, a witness for the Government, being duly sworn, testified in substance as follows:

Direct examination.

By Mr. Jones:

I am the Drug and Liquor Inspector of the State Department of Public Safety, and at various times worked with Fred Cronenwett, Federal prohibition officer, and Scully and Thayer. I was working with them on the 15th of December, 1921. I had seen the two respondents before. I saw them on *on* that day. We were patrolling the road. I saw the car that has been testified to here. We were going toward Saranac, just outside of Saranac. We passed them on the road. We were going toward Saranac and they were coming from the opposite direction and we met them. We passed them. We turned around and started after them. Mr. Cronenwett got out and walked back and Mr. Thayer and myself walked back with him. John Kiro and George Carroll, the respondents here, were in the car. The sixty-eight quarts of liquor were in the car also. The liquor was back of the back of the seat. John Kiro was driving the car. I don't believe I can explain how the cushions of the back of the seat were made up. It was upholstered right over the liquor after it had been put there. The upholstery evidently had been taken off and the liquor put in the back of the seat and the upholstery put over it again.

Q. Are you able to say anything with respect as to how hard the seat was, whether the back of the seat was harder than it would have been if the liquor wasn't in there?

A. Oh, you could feel it all right. It was packed right up against the leather and the packing of the back of the seat.

19 I think the bottles could be felt through the leather of the seat. I am not positive. I didn't ride in the seat. I fetched the liquor back to town and turned it over to Deputy Marshal Hanley, in the Federal Building. Cronenwett, Thayer and Scully stayed out on the road. I came back with the liquor.

Looking at Exhibits "A' and "B," those are the same kind of bottles.

Mr. Lombard: At this point, I want to renew my objection to it. I don't know as it is necessary, but to save the point that they are not competent to use in view of the manner in which it was obtained, without a warrant.

The Court: Objection will be overruled.

Mr. Lombard: Exception.

Looking at the labels on these two bottles, that is my signature. I wrote it on there. I don't remember just when it was, but about that time. I think Exhibits A and B are two of the bottles that were taken from the car. After we stopped the car and took the liquor out, there was a conversation between Mr. Carroll and Mr. Cronenwett, on the opposite side of the cars. I was quite

a way away from them and didn't pay particular attention to it. I don't know what the conversation was.

Cross-examination.

By Mr. Lombard:

I put my name on those exhibits after they came into the Marshal's office. I didn't put any mark on them that night and I wouldn't know them from any other bottles of like make or description.

Redirect examination.

By Mr. Jones:

Q. Well, does the bottle with the label that you signed
20 enable you to tell in that regard?
A. Yes, sir.

FRED CRONENWETT, a witness for the Government, being duly sworn, testified in substance as follows:

Direct examination.

By Mr. Jones:

I am in charge of the Federal Prohibition Department in this District. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes Street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Kiro and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whiskey, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three quarters of an hour; that they had to go out to the east end of Grand Rapids, to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment, they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the 6th day of October, when I was out on the road with Mr. Scully, I was
waiting on the highway while he went to Reed's Lake to
21 get a light lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satis-

fied when I seen the car on December 15th it was the same car I had seen on the 6th day of October.

On the 6th of October, it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing.

On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car, we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said "There goes the Carroll brothers," and we went on still further in the same direction we were going, and turned around and went back to them; drove up to the side of them. Mr. Scully was driving the car, I was sitting in the front seat, and I stepped out on the running board and held out my hand and said "Carroll, stop that car," and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me and called me by the name of "Fred" just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said "Don't tear the cushion; we have only got six cases in there, and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and
22 a fellow by the name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said "Take the liquor and give us one more chance and I will make it right with you." At the same time, he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a ten dollar bill and there was some other bills; I don't know how much there was; it wasn't a large amount.

As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the Marshal's vault and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits "A" and "B".

Q. Now, those two bottles, Exhibits "A" and "B", were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it got up here?

A. We didn't label them out on the road; simply found it was liquor and sent it in and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there.

Mr. Johnson and I sealed the bottles and Mr. Johnson's name is on the label that goes over the box with mine, and this liquor was taken out of the case today.

23 It was taken out for the purpose of analyzation. The others were not broken until today.

Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car?

A. It has the appearance of it, yes, sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car.

Cross-examination.

By Mr. Lombard:

I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately.

Q. And whatever examination and what investigation you made you went right ahead and did it in your own way?

A. Yes, sir.

Q. And took possession of it, arrested them, and brought them in?

A. Yes, sir.

Q. And at that time, of course you had no search warrant?

A. No, sir.

We had no knowledge that this car was coming through at that particular time.

Redirect examination.

By Mr. Jones:

The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whiskey in one lazyback.

24 DANIEL HANLEY, a witness for the Government, being duly sworn, testified in substance as follows:

Direct examination.

By Mr. Jones:

I am a Deputy Marshal. My signature appears on Exhibits "A" and "B". I wrote that signature on them the next morning after

the whiskey and gin was brought into our office. Mr. Peterson and some other man was down in the car with these two men here. I think the name of the other man is Donker, if I am not mistaken now. I think there was sixty-eight quarts of gin and whiskey together turned over by Mr. Peterson to our office. I put it in the vault, unlocked the vault just after five o'clock in the evening, when he got there, or just before five, and I put it in the vault and locked the vault. I think these two are the only bottles that were labeled with that kind of label. The liquor remained in the vault until the next morning. So far as I know, it was kept in the vault ever since. I didn't deliver it to any one this week. I wasn't there when Mr. Cronenwett got it from the Marshal's office.

Q. Well, you know those two bottles, that those two bottles, the labels were put on at that time?

Mr. Lombard: I think it is only fair to say we don't raise any question about that.

The Court: Very well.

JOHN W. FONNER, a witness for the Government, being duly sworn, testified in substance as follows:

Direct examination.

By Mr. Watkins:

I live in Chicago, Illinois, and am an Internal Revenue
25 chemist. I received a degree in chemistry at the University of Michigan, Ann Arbor.

The Court: Is it conceded it is whiskey and gin, and intoxicating liquor?

Mr. Lombard: Undoubtedly.

The Court: There is no necessity for spending time on that then.

Mr. Watkins: That will be all.

Mr. Jones: I offer Exhibit- A and B in evidence.

The Court: They will be received.

Mr. Lombard: Of course they are received under our objection.

The Court: Received subject to the objection and an exception noted.

Mr. Jones: The Government rests.

Mr. Lombard: We rest.

(Argument waived on both sides.)

Thereupon the Court charged the jury as follows:

"GENTLEMEN OF THE JURY: The indictment in this case contains two counts. In fact, however, there is but one charge contained in the indictment. Both counts grow out of the same transaction. In the first count of the indictment these respondents are charged with unlawfully transporting intoxicating liquor, and in the second count of the indictment they are charged with unlawfully having possession of intoxicating liquor. The evidence shows that such possession as they had was had in the process of trans-

portation, if they possessed it at all, and was a part of the transportation. Therefore only the first count of this indictment will be submitted to you for your consideration.

The charge contained in the indictment is that on or about
26 the 15th day of last December, these respondents did unlawfully transport intoxicating liquor. Since the enactment of the National Prohibition Act, it has been unlawful for any person to transport in any way, that is, by automobile or upon trains or in any other manner, intoxicating liquor.

It is the claim of the Government that upon that day the Government officers were somewhere east of this city and between here and Saranac, in the county of Ionia, patrolling the road and looking for violators of the law; that they met these two respondents riding in an Olds roadster automobile; that the officers then recognized the two respondents and after meeting them on the road, they turned about their own automobile and followed the respondents, catching up with them and stopping the car; that in the car they found 68 quarts of intoxicating liquor concealed in the cushion, or the back of the seat of the car.

Gentlemen, if you are satisfied from the evidence in the case and beyond a reasonable doubt that these respondents, both of them, were transporting intoxicating liquor in that manner, in other words, that they had intoxicating liquor in the automobile; that they knew it was there, and were carrying it in the automobile, it will be your duty to convict them. If you are not satisfied of that fact beyond a reasonable doubt, it will be your duty to acquit them. You may acquit one of the respondents and convict the other, or you may convict both of them or you may acquit both of them.

Mr. Clerk, you may swear an officer.

Thereafter the jury brought in a verdict of guilty as to both defendants on both counts of the indictment.

27 [Title omitted.]

Certificate of Court.

For as much as the matters hereinbefore set forth do not fully appear in the record of said cause, wherein the said defendants were placed upon trial, this Bill of Exceptions was presented to the Court by the said defendants, George Carroll and John Kiro, jointly and severally, with the prayer that the same may be settled, allowed, signed and certified by the judge who presided at the trial of this case, which is accordingly done this 11th day of August, 1922.

I further certify that the foregoing Bill of Exceptions contains only the evidence necessary to present clearly the questions of law involved in the rulings as to which exceptions are reserved; and I further certify that in so far as the testimony is incorporated by question and answer, I deem it necessary for a proper understanding of the questions presented. C. W. Sessions, District Judge of the

United States for the Western District of Michigan, Southern division.

28 [Title omitted.]

Petition for Writ of Error.

Now come George Carroll and John Kiro, Respondents and Plaintiffs in Error herein, and say that on or about the 27th day of June, 1922, the said Court entered a judgment in said cause, in favor of the United States and against these respondents and plaintiffs in error, in which judgment and the proceedings had prior thereto in said cause, certain errors were committed, to the prejudice of these respondents and plaintiffs in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these respondents and plaintiffs in error pray that a Writ of Error may issue in this behalf, out of the Supreme Court of the United States, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States. Clare J. Hall, James A. Lombard, Thomas E. Atkinson, Attorney for Respondents and Plaintiffs in Error.

Writ of Error Allowed July 14", 1922. C. W. Sessions, United States District Judge.

29 [Title omitted.]

Assignment of Errors.

The Respondents and Plaintiffs in Error in this cause, in connection with their Petition for Writ of Error, make the following Assignment of Errors which they aver exist:

First. That the United States Commissioner erred in overruling the respondents' motion for the return of certain property seized by the Federal Prohibition Agents.

Second. That the trial court erred in denying the motion of respondents and plaintiffs in error for the return of certain property seized by the Federal Prohibition Agents.

Third. That the trial court erred in admitting in evidence certain property seized by the Federal Prohibition Agents and information obtained in connection with said seizure.

Fourth. That the trial court erred in holding that certain property seized was not obtained and put in evidence in violation of the rights of respondents and plaintiffs in error, under the fourth and fifth Amendments to the Constitution of the United States.

30 Fifth. That the trial court erred in admitting in evidence certain liquor, Exhibits A and B, over respondents' objection that the same was obtained and used in evidence in violation of the rights of respondents and plaintiffs in error under the fourth and fifth Amendments to the Constitution of the United States.

Sixth. That the trial court erred in admitting in evidence, over respondents' objection, certain testimony of Arthur Scully, as to

conversation alleged to have taken place with Mr. Cronenwett and respondents in September, 1921.

Wherefore, the respondents and plaintiffs in error pray that said judgment be reversed. Clare J. Hall, James A. Lombard, Thomas E. Atkinson, Attorneys for Respondents and Plaintiffs in Error.

Service of copy of above assignments of error accepted this 14" day of July, 1922. Edward J. Bowman, United States Attorney.

31 [Title omitted.]

Stay and Supersedeas Bond.

Know all men by these presents: That we, George Carroll, of Detroit, Michigan, as principal, and Frederick W. Bauer, of Muskegon, Michigan, and Walter H. Vincent and Joseph J. Johnson, both of Grand Rapids, Michigan, as sureties, are held and firmly bound unto the United States of America in the full and just sum of One Thousand Dollars ($1,000.00) lawful money of the United States, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of June, in the year of our Lord One Thousand Nine Hundred and twenty-two.

Whereas, lately, at the District Court of the United States for the Western District of Michigan, Southern Division, said George Carroll was indicted by the Grand Jury and charged with a violation of the National Prohibition Act, so-called, and said cause coming on to be heard before a jury, said George Carroll was convicted as in said indictment charged, and later and on the 27th day of June, 1922, said George Carroll was sentenced by the said Court to pay a fine in the sum of Five Hundred Dollars ($500.00), payable in five days from said date, and in default of said payment that said George Carroll be imprisoned in the Kent County Jail until said fine was paid, not to exceed a term of four months, and a stay of execution and other proceedings having been asked for by said George Carroll, and the Court having ordered that upon the filing of a bond in the sum of One Thousand Dollars ($1,000.00), with sufficient sureties, a stay of proceedings should be had, within which to settle and sign a bill of exceptions and to sue out a Writ of Error in said cause from the Supreme Court of the United States or the Circuit Court of
32 Appeals for the Sixth Circuit, for the review of said cause, and it is necessary for the proper review of said cause to sign and settle a bill of exceptions therein.

Now the condition of the above obligation is such that if the said George Carroll shall cause said bill of exceptions to be signed and settled within a period of thirty days, and shall prosecute a Writ of Error to effect, and answer all damages and costs if he fail to make his plea good, or shall pay the judgment rendered in said cause, or surrender himself in full execution of said judgment, then this obligation to be void; else to remain in full force and effect. George

Carroll. Frederick W. Bauer. Walter H. Vincent. Joseph J. Johnson.

Signed and delivered in the presence of Thomas E. Atkinson and M. M. Dempsey.

WESTERN DISTRICT OF MICHIGAN,
County of Kent, ss:

On this 27th day of June, 1922, before me personally appeared Frederick W. Bauer, Walter H. Vincent & Joseph H. Johnson sureties who signed the foregoing bond, and being by me duly sworn, each for himself says that he is worth the amount of said bond, over and above all debts and legal exemptions. Mary Madelon Dempsey, Notary Public, Kent County, Michigan. My commission expires Jan. 18, 1924. (Copy seal.)

33 [Title omitted.]

Stay and Supersedeas Bond.

Know all men by these presents: That we, John Kiro, of Detroit, Michigan, as principal, and Frederick W. Bauer, of Muskegon, Michigan, and Walter H. Vincent and Joseph J. Johnson, both of Grand Rapids, Michigan, as sureties, are held and firmly bound unto the United States of America in the full and just sum of One Thousand Dollars ($1,000.00) lawful money of the United States, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-two.

Whereas, lately, at the District Court of the United States for the Western District of Michigan, Southern Division, said John Kiro was indicted by the Grand Jury and charged with a violation of the National Prohibition Act, so-called, and said cause coming on to be heard before a jury, said John Kiro was convicted as in said indictment charged, and later and on the 27th day of June, 1922, said John Kiro was sentenced by the said Court to pay a fine in the sum of Five Hundred Dollars ($500.00), payable in five days from said date, and in default of said payment that said John Kiro be imprisoned in the Kent County Jail until said fine was paid, not to exceed a term of four months, and a stay of execution and other proceedings having been asked for by said John Kiro, and the Court having ordered that upon the filing of a bond in the sum of One Thousand Dollars ($1,000.00), with sufficient sureties, a stay of proceedings should be had, within which to settle and sign a bill of exceptions and to sue out a Writ of Error in said cause from the Supreme Court of the United States or the Circuit Court of Appeals for the
34 Sixth Circuit, for the review of said cause, and it is necessary for the proper review of said cause to sign and settle a bill of exceptions therein.

Now the condition of the above obligation is such that if the said John Kiro shall cause said bill of exceptions to be signed and settled within a period of thirty days, and shall prosecute a Writ of Error to effect, and answer all damages and costs if he fail to make his plea good, or shall pay the judgment rendered in said cause, or surrender himself in full execution of said judgment then this obligation to be void; else to remain in full force and effect. John Kiro. Frederick W. Bauer. Walter H. Vincent. Joseph J. Johnson.

Signed and delivered in the presence of Thomas E. Atkinson and M. M. Dempsey.

WESTERN DISTRICT OF MICHIGAN,
County of Kent, ss:

On this 27th day of June, 1922, before me personally appeared Frederick W. Bauer, Walter H. Vincent & Joseph J. Johnson sureties who signed the foregoing bond, and being by me duly sworn, each for himself says that he is worth the amount of said bond, over and above all debts and legal exemptions. Mary Madelon Dempsey, Notary Public, Kent County, Michigan. My commission expires Jan. 18, 1924. (Copy seal.)

35 [Title omitted.]

Order Enlarging Time.

[Dated July 26, 1922.]

On application of Edward J. Bowman, United States Attorney, the time for settling the bill of exceptions in the above entitled cause is hereby extended to the 19th day of August, A. D. 1922. C. W. Sessions, District Judge.

36 & 37 **Citation and Service.**

UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

To United States of America and Edward J. Bowman, United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington on the 16 day of September next, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Michigan, Southern Division, wherein George Carroll and John Kiro are plaintiffs in error and the United States of America is defendant in error, to show cause; if any there be, why the judgment rendered against the said plaintiffs in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the City of Grand Rapids, in the District above named, this 18 day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-two. A. C. Denison, Circuit Judge.

Due personal service of a copy of the above citation admitted this 18 day of August, 1922. E. J. Bowman, United States Attorney.

38 [Endorsement omitted.]

39 [Title omitted.]

Præcipe for Transcript.

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the Supreme Court of the United States, under the Writ of Error heretofore allowed by said Court, and include in the said transcript the following proceedings, pleadings and papers on file to-wit:

(1) Warrant for Arrest.
(2) Return of United States Commissioner.
(3) Indictment.
(4) Petition of George Carroll for return of property etc.
(5) Petition of John Kiro for return of property etc.
(6) Order denying petitions for return of property.
(7) Bill of Exceptions.
(8) Verdict and Judgment.
(9) Petition for Writ of Error.
(10) Order allowing Writ of Error.
(11) Assignment of Errors.
40 (12) Order extending time to settle bill of exceptions.
(13) Supersedeas Bond.
(14) Writ of Error.
(15) Clerk's Return to Writ of Error.
(16) Præcipe for Transcript of Record.
(17) Citation.
(18) Clerk's certificate to Transcript of Record and all endorsements on all said papers.

Said transcript is to be prepared as required by law and the rules of the Supreme Court of the United States. Clare J. Hall, James A. Lombard, Thomas E. Atkinson, Attorneys for Respondents and Plaintiffs in Error.

Service of copy of above præcipe accepted July 14th, 1922. Edward J. Bowman, United States Attorney.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you,

between The United States of America as Plaintiff and George Carroll and John Kiro as defendants, a manifest error hath happened, to the great damage of the said George Carroll and John Kiro, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 16th day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the said Supreme Court, the 18 day of August in the year of our Lord one thousand *eight* hundred and twenty-two. Chas. J. Potter, Clerk of the District Court of the United States. [Seal of the U. S. District Court, Western District of Mich., Southern Division.]

Allowed by A. C. Denison, Circuit Judge.

42 **Clerk's Certificate.**

UNITED STATES OF AMERICA,
Western District of Michigan,
Southern Division, ss:

I, Chas. J. Potter, Clerk of said Court, do hereby certify that the annexed and foregoing is a true and compared copy of all the files and records in the within entitled cause, pursuant to the præcipe for record on appeal of appellant's counsel and the order of the court thereon, to which I have attached the original citation in said cause, the whole constituting the transcript on appeal as made up in conformity to such præcipe and order therefor.

Witness my official sig*an*ture and the seal of said Court at the City of Grand Rapids in said District and Division, this 23rd day of August, in the year of our Lord one thousand nine hundred and twenty-two. Chas. J. Potter, Clerk. [Seal of the U. S. District Court, Western District of Mich., Southern Division.]

Endorsed on cover: File No. 29,131. W. Michigan D. C. U. S. Term No. 581. George Carroll and John Kiro, plaintiffs in error, vs. The United States. Filed September 5th, 1922. File No. 29,131.

FILE COPY

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WM. R. STANSBU

In The

Supreme Court of the United States

October Term, 1922.

No. 117
(29,131)

GEORGE CARROLL, and
JOHN KIBO,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

CLARE J. HALL,
Attorney for Plaintiffs in Error.
Grand Rapids, Mich.

JAMES A. LOMBARD,
THOMAS E. ATKINSON,
Of Counsel.

Law Print & Record Co., 4469 Third Ave., Detroit, Mich.

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In The

Supreme Court of the United States

October Term, 1922.

No. 581.
(29,131)

GEORGE CARROLL, and
JOHN KIRO,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

(The references by number contained in this brief refer to the page of the printed record unless the context indicates the contrary.)

Plaintiffs in error were convicted in the District Court for the Western District of Michigan for transportation and possession of liquor in violation of the National Prohibition Enforcement Act. Writ of error was issued direct to this court from the District Court.

On the 15th day of December, 1921, plaintiffs in error were driving in an Oldsmobile roadster automobile (3, 5)

owned by George Carroll, one of the plaintiffs in error, on the public highway (1). They were met by prohibition officers (1) who passed them and later came up from behind and stopped them (4, 6). The officers were not on the lookout for plaintiffs in error (1) and had no reason to believe that they were transporting liquor (2, 4, 5). The officers searched each of plaintiffs in error (4, 5) and also the car (2, 4, 5). At first the officers found nothing and were about to release plaintiffs in error (4, 5) but later found 73 quart bottles of liquor (3, 5) concealed in the cushions of the car (2, 4, 5). The bottles were found by tearing the back cushion of the car (4, 5). The plaintiffs in error were then arrested and the liquor and car seized by the federal officers (1, 4, 5). No warrant was issued until the following day (1, 4, 5).

The plaintiffs in error filed a petition with the United States Commissioner for a return of the property seized and for a dismissal of the case upon the ground that the evidence was obtained through an illegal search, which motion was denied (1, 2).

Plaintiffs in error were jointly indicted on June 10, 1922, for transportation (2) and possession (3) of liquor in violation of the National Prohibition Act.

On June 13, 1922, plaintiffs in error filed separate sworn petitions setting out the facts substantially as above for a return of the property seized and asking that the search and seizure be declared illegal because in violation of their rights under the Fourth and Fifth Amendments of the Constitution of the United States (3-6). No counter affidavits were filed. The petitions or motions were heard by the court on June 19, 1922, and were denied after argument (6). The court delivered an oral opinion which is not contained in the record for the reason that there was no stenographer present.

The case was tried June 20, 1922 (7), and the motions renewed, denied by the court and an exception noted (7).

The plaintiffs in error were not sworn and no testimony was offered in their behalf. The testimony showed that plaintiffs in error were stopped by three federal prohibition agents, Cronenwett, Scully and Thayer and Walter A. Petersen, Drug and Liquor Inspector of the State Department of Public Safety (7, 10). The substantial facts contained in the plaintiffs' in error petitions are not contradicted. The officers were out patrolling the road (7, 10) and had no knowledge or information that the car was coming through (8, 13). They admit they had no warrant at the time (8, 13). The officers first passed the Carroll car, and then turned about and overtook and stopped plaintiffs in error (8, 10, 12). Cronenwett admits he had a gun in his pocket and denies that he presented it (11). The officers searched the car in their own way (13) raised up the back part of the roadster and also the cushion and found nothing (12). Cronenwett testified that he then struck at the lazyback of the seat and it was hard (12); practically solid (13). Petersen said he thought the bottles could be felt through the seat but is not positive (10). Cronenwett testified that he started to open the seat up and did tear the cushion (12). He further said that Carroll tried to bribe him to let him go (12); Scully so testified (9). The officers took possession of the liquor (13) and arrested Carroll and Kiro (13, 9). The liquor was taken to Grand Rapids by Mr. Petersen and turned over to the deputy marshal (10). It was produced at the trial and admitted in evidence over objection of plaintiffs in error and an exception noted (14). No question was raised as to the identity of the liquor and it was conceded to be intoxicating.

Cronenwett testified that he first met the plaintiffs in error September 29, 1921; that they came to Scully's apartment in company with a man called Kruska (11); that Cronenwett said he was working for a furniture company and wanted three cases of whisky; that a price was agreed upon and the three went away to get the liquor; that they came back and Kruska said they could not get

it that night but would deliver next morning at ten o'clock; that they did not deliver it next day (11). Witness Scully also testified to some of these facts (8, 9). Both say that plaintiffs in error had the same car with them on this evening that they had on December 15, 1921, the date of the seizure and arrest (9, 11, 12). These two witnesses also testified that they saw the plaintiffs in error driving toward Detroit on October 6th in the same car and that they followed them to East Lansing (8, 12).

The case was submitted to the jury without argument and defendants found guilty upon both counts and each sentenced to pay a fine of $500.

SPECIFICATION OF ERRORS.

The plaintiffs in error rely on the following assignment of errors, found on page 16 of the record:

> First. That the United States Commissioner erred in overruling the respondents' motion for the return of certain property seized by the federal prohibition agents.
>
> Second. That the trial court erred in denying the motion of respondents and plaintiffs in error for the return of certain property seized by the federal prohibition agents.
>
> Third. That the trial court erred in admitting in evidence certain property seized by the federal prohibition agents and information obtained in connection with said seizure.
>
> Fourth. That the trial court erred in holding that certain property seized was not obtained and put in evidence in violation of the rights of respondents and plaintiffs in error, under the Fourth and Fifth Amendments to the Constitution of the United States.

Fifth. That the trial court erred in admitting in evidence certain liquor, Exhibits A and B, over respondents' objection that the same was obtained and used in evidence in violation of the rights of respondents and plaintiffs in error under the Fourth and Fifth Amendments to the Constitution of the United States.

Sixth. That the trial court erred in admitting in evidence, over respondents' objection, certain testimony of Arthur Scully, as to conversation alleged to have taken place with Mr. Cronenwett and respondents in September, 1921.

ARGUMENT.

I. This Court Has Complete Jurisdiction Under the Writ of Error Taken Direct From the District Court.

Section 238 of the Judicial Code provides:

> "Appeals and writs of error may be taken from the district courts, * * * direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States * * * is drawn in question." * * *

The case at bar clearly involves the construction and application of the Fourth and Fifth Amendments of the Constitution of the United States. It is the contention of plaintiffs in error that the evidence upon which the government case is based was obtained by means of an illegal and unconstitutional search and seizure and was used in violation of the constitutional rights of plaintiffs in error. This contention does directly involve the construction and application of the Constitution of the United States.

> *Motes v. United States, 178 U. S., 458; 20 Sup. Ct., 993, 996.*

The *Motes case* was one in which there was a writ of error taken out from the circuit court direct to the Supreme Court. One of the controversies in the case was whether the reading of the statement taken on preliminary

examination of a witness absent at the trial violated the Sixth Amendment as not giving the accused the right to be confronted with witnesses. This court speaking through Mr. Justice Gray held that the writ of error was properly issued direct to the Supreme Court, saying:

> "The present case does involve the construction and application of the Constitution of the United States. It is necessary to determine whether the admission of certain testimony was not an infringement of rights secured to the accused by the Sixth Amendment of the Constitution declaring that in all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him."

The instant cause is an exact parallel to the *Motes case*, except that the Fourth and Fifth Amendments are here involved instead of the Sixth Amendment. The holding in the *Motes case* has never been questioned. In the following cases this court entertained a writ of error direct from the district court where it was claimed that defendants' rights under the Fourth and Fifth Amendments were violated by the search and seizures made by government officers and evidence obtained thereby introduced in evidence.

Weeks v. United States, 232 U. S., 383; 34 Sup. Ct., 341.

Silverthorne Lumber Co. v. United States, 251 U. S., 385; 40 Sup. Ct., 182.

Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266.

In addition, the constitutionality of a law of the United States is drawn in question.

Section 26 of the Federal Prohibition Enforcement Law (Barnes Federal Code, 1923, Sec. 8352-a), provides:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any

> person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle * * * and shall arrest any person in charge thereof." * * *

If the foregoing passage is construed as meaning that an officer may search any and all vehicles running or standing on a public highway or private place and if liquor is found, seize the same and the vehicle and arrest the occupants, then we surely contend that the act is unconstitutional and in violation of the Fourth and Fifth Amendments.

There are then two distinct grounds upon which the writ of error may be taken to this court direct from the district court, viz: because of appellant's claim that their constitutional rights have been invaded before and at the trial and because the act under which the federal officers evidently derived their authority is unconstitutional. In fact it is only fair to say that the appellant's objections to the judgment of the court are practically all of a constitutional nature.

However, all questions raised in the assignment of errors are properly before this court. In *Chappell v. United States, 160 U. S., 499, 509,* the court said:

> "This court * * * has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States is drawn in question; and, having acquired jurisdiction under the clause, has the power to dispose not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits" (citing cases).

II. The Arrest of the Plaintiffs in Error in This Case Was Illegal.

In this case the record shows that the search of plaintiffs in error preceded their arrest. The ordinary course of events are first, a warrant is issued for arrest, second, the arrest is effected, third, the accused and his immediate belongings may then be searched. We do not question the well established principle that a person legally arrested may be searched. However, in the instant cause the exact opposite order of procedure was observed. First, plaintiffs in error were stopped on the public highway and, they and their car were searched; second, the liquor and car were seized; third, plaintiffs in error were arrested; fourth (and most irregular of all) a warrant was issued for their arrest on the next day. Naturally in this case the legality of the arrest and of the search and seizure are to a large degree questions which dovetail into each other. However we deem it helpful to consider the questions of arrest on one hand and search and seizure on the other, separately as far as possible. The present division of the brief is devoted principally to the subject of the legality of the arrest of plaintiffs in error.

The general rule is that an officer cannot arrest a person legally without a warrant. To this rule there are only two exceptions. See authorities *infra.*

(1) An officer may arrest without a warrant where a felony is committed or attempted in the officer's presence or where the officer has reasonable grounds to suspect that one has committed a felony.

(2) An officer may arrest without a warrant for a misdemeanor provided first the offense is committed in his presence and second the offense amounts to a breach of the peace.

State v. Lutz, 85 W. Va., 330; 101 S. E., 434.

A. The Officers Had No Reasonable Grounds to Suspect That a Felony Was Being Committed.

Even if the officers had reasonable grounds for suspicion that defendants had committed the very offense, of which they were convicted, that offense did not constitute a felony.

Section 29 of the National Prohibition Enforcement Act after setting forth the penalty for the manufacture and sale of liquor provides:

> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense shall be fined no less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment." * * *

No prior convictions of plaintiffs in error were pleaded in the indictment or shown at the trial or suggested in any other manner. The amount of the fines, viz: $500 each shows that these convictions were not regarded as third offenses.

Section 335 of the Criminal Code (35 Stat., 1152, Barnes Federal Code, Sec. 10,038), provides:

> "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall

be deemed felonies. All other offenses shall be deemed misdemeanors."

It is perfectly clear therefore that as the maximum penalty for the first offense does not involve any imprisonment at all but only a fine, the offense is only a misdemeanor and not a felony. There would be no felony unless there were two previous convictions. This position has been maintained in the following cases, involving first offenses under the National Prohibition Act.

Cleveland v. Mattingly, 287 Fed., 948 (Ct. of App. D. of C.).
United States v. Illig, 288 Fed., 939 (D. C. W. D. of Pa.).
Snyder v. United States, 285 Fed., 1 (C. C. A., 4th Cir.).

It is clear that no felony was committed. It is also clear that there was no reasonable ground for belief that the plaintiffs in error had committed any greater crime than that of which they were convicted. There is absolutely nothing to indicate that the officers in any way suspected that plaintiffs in error were committing any offense greater than a misdemeanor.

B. Indeed it is Also Clear That There Were No Reasonable Grounds to Even Suspect That Even a Misdemeanor Had Been Committed.

There was nothing about the appearance of the car to indicate that it carried liquor. The liquor was only found after a thorough search and destruction of the cushion (4, 5, 12). Two of the officers testified that they had seen the car twice before but there was no evidence that it had ever transported liquor before. The officers had never purchased liquor from plaintiffs in error although they testified that they had tried and had not been successful (8, 9, 11). The officers admit that they had no informa-

tion that this car was coming through at this particular time (8, 13) and that they were merely patrolling the road (7).

The following passage occurs in the report of the United States Commissioner, and is nowhere denied:

> "The witness (Arthur Q. Scully, one of the arresting prohibition agents) stated that when the respondents were met upon the highway by the prohibition officers, the prohibition officers were not on the lookout for the respondents and had no reason to believe that the respondents were transporting liquor" (1, 2).

From their own admission the officers had no reason to believe that the plaintiffs in error were committing a felony or a misdemeanor. The search must therefor have been based upon a mere capricious venture.

C. No Misdemeanor Was Committed In the Officers' Presence and Hence the Officers Could Not Legally Arrest Without a Warrant.

In *Kurtz v. Moffitt, 115 U. S., 487, 6 Sup. Ct., 148,* Mr. Justice Gray said, speaking for the court:

> "By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of a felony, and then only for the purpose of bringing the offender before a civil magistrate."

It is true that the plaintiffs in error were seen by the arresting officers. It is also true that at the time they were so seen, they were committing a misdemeanor. But where the fact of the commission of the offense is only dis-

coverable by means of a search, the offense is not in legal contemplation committed in the presence of an officer.

Snyder v. United States, 285 Fed., 1 (C. C. A., 4th Cir.).
Pickett v. State, 99 Ga., 12; 25 S. E., 609; 59 Am. St. Rep., 226.
State v. Lutz, 85 W. Va., 330; 101 S. E., 434.
Roberson v. State, 43 Fla., 156; 52 L. R. A., 751; 29 So., 535.

The case of *Snyder v. United States, supra,* is one in which a federal prohibition agent observed that the defendant's overcoat pocket was bulging and the neck of a bottle protruding therefrom. The officer lifted the bottle half way out of his pocket and being convinced that it contained whisky, arrested defendant and searched him and found three similar bottles all containing whisky. Pending trial defendant moved to have the evidence suppressed upon the ground that it was obtained in violation of his constitutional rights. This motion was denied by the district court. In reversing the case the Circuit Court of Appeals said:

> "What we are therefore called on to determine is whether evidence of a misdemeanor obtained under the circumstances hereinabove enumerated is, where seasonable motion for its suppression has been made, admissible at the trial.
>
> That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defend-

ant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful."

In *Pickett v. State, 99 Ga., 12; 25 S. E., 608; 59 Am. St. Rep., 226,* the defendant claimed that he was justified in resisting arrest and assaulting an officer. It appeared that the officer insisted on searching defendant without a warrant for concealed weapons. The officer claimed he was told by some person that defendant was armed. The court said speaking through Mr. Justice Lumpkin:

"While, under Section 4723 of the Code, an officer may, without a warrant, make an arrest for an offense committed in his presence, he has no authority, upon bare suspicion or upon mere information derived from others, to arrest a citizen and search his person in order to ascertain whether or not he is carrying a concealed weapon in violation of law. The constitution of this state expressly declares in the bill of rights that: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated': Code, Section 5008. If any search is unreasonable and obnoxious to our fundamental law, it is one of the kind with which we are now dealing. Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal con-

> templation, committed in the presence of the officer, and the latter violated a sacred constitutional right of the citizen in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality."

We submit then that upon the holdings of the foregoing cases and upon reason it cannot be said that a misdemeanor was committed in the presence of the officers so as to justify an arrest without a warrant.

Indeed the court in the *Snyder case* went much further than is necessary to go in the instant cause. There the bottle was visible, but in the instant cause there was nothing about the plaintiffs in error or the car which suggested the presence of liquor. The liquor was found in the instant cause only by means of a thorough search and partial destruction of the car.

D. The Offense Does Not Constitute a Breach of the Peace.

It must be remembered that not only does a misdemeanor have to be committed in the presence of the officer but in addition it must be a breach of the peace. *State v. Lutz, 85 W. Va., 330; 101 S. E., 434.* We submit that the offense was not committed in the presence of the officers (Sec. C, *supra*) and furthermore that it was not a breach of the peace. There are therefore at least two reasons why the arrest was illegal in the instant cause.

> "A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."
>
> *People v. Most, 64 N. E., 175; 171 N. Y., 423; 58 L. R. A., 509.*

It was held in *Yerkes v. Smith, 157 Mich., 557; 122 N. W., 223,* that playing base ball on Sunday though made unlawful did not constitute a breach of the peace. Mr. Justice Hooker said for the court:

> "We have said that the mere playing of a game of base ball upon Sunday is not of itself necessarily a breach of the peace, justifying arrest and indictment. In a sense a game of base ball on Sunday may often be a breach of the peace, perhaps usually is, but it cannot be said that it is necessarily so, and before a summary arrest can be made for a breach of the peace, not only must overt acts be committed in the presence of the officer, but they must be violent and dangerous acts of some sort."

Under the commonly accepted definition of a breach of the peace, we submit that the secret and nonviolent character of the act of plaintiffs in error prevent it from being considered a breach of the peace. Often a certain offense is declared to be a breach of the peace by statute. We find no section of the National Prohibition Enforcement Act which so defines the acts of transportation and possession of liquor. Section 21 declares that any room, vehicle, etc., where liquor is sold, manufactured or kept is a nuisance. This section does not refer to vehicles used for the purpose of transportation only. Moreove it was held in the case of *Danovan v. Jones, 36 N. H., 246,* that an officer had no right without a warrant to arrest a person for the erecting of a nuisance in his presence.

III. The Search and Seizure Were in Violation of the Constitutional Rights of the Plaintiffs in Error.

We do not question the well established principle recognized by way of dictum in *Weeks v. United States, 232 U. S., 383; 34 Sup. Ct., 341,* that an officer may search a person legally arrested to discover and seize the fruits or evidences of the crime. But this principle has no application to the instant cause for two reasons, viz: first the search preceded the arrest (2, 4, 5, 13, 9) and second the arrest being illegal (see Division II of this brief) gave no more right to search than if there had been no arrest at all.

Pickett v. State, 99 Ga., 12; 25 S. E., 608; 59 Am. St. Rep., 226.
Youman v. State, 189 Ky., 152; 224 S. W., 860.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.

In *State v. Wills, 91 W. Va., 659; 114 S. E., 261,* the conviction of defendant by the trial court for possession of liquor was reversed. Mr. Justice Meredith speaking for the court said:

> "He was doubtless arrested on mere suspicion of having 'moonshine liquor' in his possession; if so, that suspicion turned out to be well founded, but the officer does not say that he even had such suspicion. After his arrest, the officer searched his person and found two bottles of liquor on him, containing about a pint and a half. The officer had no warrant either for his arrest or search. It may be admitted that had he been lawfully arrested for the offense, then his subsequent search would have been lawful. But his arrest was unlawful, as, within the meaning of *State v. Lutz, supra,* there was no such offense being committed by defendant in the officer's presence as authorized the officer to arrest without a warrant. His arrest being unlawful, it necessarily follows that the subsequent search of his person was

unlawful, and the evidence of his offense was unlawfully and illegally obtained. The question then arises whether, on a trial for the offense of having the 'moonshine liquor' in his possession, the liquor or any evidence of the offense, so procured by means of the unlawful search, can be given in evidence by the state over the objection of the defendant. It is not a case of lawful arrest, followed by search, where the accused claims the search unlawful, but one where both arrest and search were alike unlawful.

Counsel for defendant claim that to admit such evidence violates his rights under the Fifth and Sixth Sections of Article 3 of the State Constitution. The Fifth Section provides that:

'No person shall be transported out of, or forced to leave the state for any offense committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself.'

Section 6 provides:

'The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.' "

In *Youman v. State, 189 Ky., 152; 224 S. W., 860,* it appeared that the officer had a warrant for defendant's arrest and called at his home. The defendant was not at home but his wife was there. The officer searched the premises and found liquor there. In reversing the case Mr. Chief Justice Carroll said for the court in a well considered opinion:

"In this connection it should further be said that, as the possession of intoxicating liquors for the purpose of sale in violation of the law was a public offense, it is not to be doubted that a search warrant in the manner and form authorized by Sec. 10

of the Constitution might be issued, conferring authority on the officer to search the premises, person, baggage, and personal belongings of an alleged offender, or that evidence that liquor found under such a warrant would be competent, as well as the evidence of the officers describing the place where they found it. *3 R. C. L., 154; Getchell v. Page, 103 Me., 387; 18 L. R. A. (N. S.), 253; 69 Atl., 624; People v. Campbell, 160 Mich., 108; 34 L. R. A. (N. S.), 58; 136 Am. St. Rep., 417; 125 N. W., 42; State v. Mausert, 88 N. J. L., 286; L. R. A., 1916-C, 1014; 95 Atl., 991.*

But no search of the person or personal baggage or personal belongings, or seizure of any articles found thereon or therein, can be made on suspicion or without a search warrant, unless and until the offender is first taken into custody under a warrant of arrest, or his arrest without a warrant is authorized by Sec. 36 of the Criminal Code, providing that an officer may make an arrest without a warrant, * * * 'when a public offense is committed in his presence, or when he had reasonable ground for believing that the person arrested has committed a felony.' "

In *People v. Margelis, 217 Mich., 423; 186 N. W., 488,* the officer asked defendant for liquor. The defendant went upstairs to get it and returning was met at the bottom of the stairs by the officer. It was dark and the officer grabbed him and wrestled a bottle away from him. It was held error to receive the liquor in evidence, the court saying through Mr. Justice Clark:

"Counsel for the people say that there were sufficient reasons of belief to justify an arrest of defendant Margelis without warrant for felony, that what has been related constituted a lawful arrest, and that it was lawful to take from his person the bottle of whisky after his arrest. The infirmity of this is the assuming a lawful arrest. Defendant,

when seized by the officer, was not advised that he was under arrest. There was neither a present intention to arrest nor submission to arrest. The treatment he received was for the sole purpose, the record shows, of securing for the purpose of evidence the whisky supposed to be on his person. It was not an arrest. *4 C. J., 385-387.* It was error to receive in evidence the whisky so obtained."

In *United States v. Myers, 287 Fed., 260 (D. C. W. D. Ky.),* it appeared that a prohibition agent saw the defendant driving his automobile and claimed to have seen indications that the driver was intoxicated and forced him to stop at the point of a pistol. He searched the car and found whisky. In a well considered opinion holding that evidence of the whisky was not admissible in evidence, District Judge Walter Evans, after citing opinions of this court, said page 262:

"We do not, of course, lose sight of the further proposition that if, for example, an officer sees intoxicating liquors being loaded upon an automobile or other vehicle, he can thereupon seize the vehicle and arrest the person who has put the liquor upon it. He does not, under such circumstances, have to extort from the offender any testimony. Other palpable situations might also authorize similar action, such, for example, as plainly seeing the liquor leaking from a vehicle in which it is being transported, such a leak expending itself upon the public highway and the spirits spreading themselves and their odor along the road. No testimony would have to be extorted from the offender in cases like these, as the whole situation in each supposed case is developed by facts plainly shown.

It was under circumstances similar to those last described that Judge Cochran, of the Eastern District of Kentucky held a seizure and arrest to be entirely proper, and there can be no doubt about the perfect accuracy of that decision, though it is by no means

applicable to a case like this, where the only testimony that an offense had been or was being committed was discovered at the point of a pistol and without the consent of the defendant. A mere supposition that the driver of the automobile was possibly intoxicated in no way brought this case within the principle of the one so decided, nor justified depriving the defendant of his constitutional rights.

His motion for an instructed verdict of not guilty is therefore sustained, and the jury will be directed accordingly."

The Fourth Amendment of the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The history of this Amendment has been admirably and particularly set forth in the case of *Boyd v. United States, 116 U. S., 616; 6 Sup. Ct., 524.* It would be idle to here repeat that history. The right to be secure against unreasonable searches and seizures has been dear to the English speaking people. That right has heretofore been carefully protected as a constitutional principle by decisions of this court.

The Fourth Amendment mentions four things which are protected, viz: Persons, houses, papers and effects. The decisions of this court, however, have largely been confined to cases in which the houses of accused have been searched without a warrant and papers of an evidential nature obtained as a result of the search. But the maxim that "a man's home is his castle" does not include the full scope of the Fourth Amendment. It likewise protects the persons,

and effects, wherever they may be, against unreasonable searches and seizures. This is illustrated by the recent case of *Gouled v. United States, 255 U. S., 298; 41 Sup. Ct., 261,* in which this court held that a seizure by stealth in an office without a search warrant was in violation of the Fourth Amendment. The court attached no significance to the fact that papers as distinguished from other property were taken, saying, page 309:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant."

Moreover in the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266,* whisky, seized by federal officers in a search of accused's home without a warrant, was held to be within the protection of the Fourth and Fifth Amendments.

The state courts have held, in well considered cases, that a search of personal property not contained in a house or building without a search warrant violates the section of the state Bill of Rights corresponding to the Fourth Amendment.

People v. Margelis, 217 Mich., 423; 186 N. W., 488.
People v. Foreman, 218 Mich., 591; 188 N. W., 375.
Blacksburg v. Beam, 104 S. C., 146; 88 S. E., 441.
Tillman v. State, 81 Fla., 558; 88 So., 377.
Pickett v. State, 99 Ga., 12; 25 S. E., 608.
Hoyer v. State, Wis., ...; 193 N. W., 89.
Butler v. State, 129 Miss., 778; 93 So., 3.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.

In *People v. Foreman, 218 Mich., 591; 188 N. W., 375,* the defendant's grip was searched by an officer who had neither a warrant nor a search warrant. Liquor was found

therein and evidence of the finding was admitted over the defendant's objection. The conviction was reversed upon the ground that the constitutional guarantee against unreasonable searches and seizures had been violated.

In *State v. Wills, 91 W. Va., 659; 114 S. E., 261,* the defendant was arrested and searched without a warrant and liquor found on his person. The state claimed that the officer knew of the presence of the liquor from a third person who had sold it to the defendant. In holding the search in violation of constitutional rights it is said:

> "But we are told that the constitutional privilege under Section 5 is strictly limited to admission of the party, as a witness, and that that provision does not apply to incriminating articles taken from the accused illegally; that if the accused is required, as a witness, under judicial process, to produce the incriminating articles, it applies and he can claim his privilege; but if the state does not choose to act under the law and pursuant to the law, but wholly without the law, it may do so, it may forcibly and illegally seize them from the accused, either from his person or his home, and use them against him. Possibly that might be true, if it were not for Section 6, which prohibits unreasonable searches. That prohibition was meant, not for private persons, but for the state and all its officers. Searches and seizures made by private persons or officials acting in their private capacity or for private purposes, were always against law and needed no constitutional inhibition. We repeat that Section 6 was meant for the state. It makes it unlawful for anyone acting in an official capacity under governmental authority to make unreasonable searches and seizures. It does not prohibit all searches and seizures, but only those which are unreasonable. And what are unreasonable? Certainly all those searches and seizures that are unlawful. To search without a search warrant the person of one not charged with felony, nor committing an

offense within the presence of the officer which would authorize his arrest without a warrant, is an unlawful and therefore an unreasonable search; and to seize liquors, so found upon him, after such unlawful search, is an unlawful and therefore an unreasonable seizure."

In *Hoyer v. State, 193 N. W., 89,* a decision by the Wisconsin Supreme Court, decided in April, 1923, it appeared that an officer saw the car of defendant standing on the street after a collision. He claimed he "could smell something funny" and saw a package in the car. He examined the package and found it contained a bottle of liquor. The defendant asked the court to suppress this evidence. The trial court refused. In the Supreme Court the case was reversed and the search held to be in violation of defendant's constitutional rights. The court said, speaking through Mr. Justice Eschweiler:

> "Under their testimony the situation presented to these officers at the time they entered the automobile and took its contents was one which, at the most, might have justified the issuance of a search warrant by a magistrate. The granting of such a writ, however, is a matter for judicial determination and not within the much more limited field of the discretion vested in executive or administrative officers *(State v. Peterson, 27 Wyo., 185; 194 Pac., 342; 13 A. L. R., 1284),* and the many authorities in that case cited. The search and seizure in this case was, upon the facts presented, without sufficient warrant in law and therefore unlawful."

The court then proceeds to review the recent decisions of both the state and federal courts and stated that they deemed it proper not to send the case back for a new trial but to direct the discharge of the defendant.

In *Tillman v. State, 81 Fla., 558; 88 So., 377,* it was held that the attempt to seize a gallon can or jug from the de-

fendant, a negro, by the deputy sheriff, without a warrant or search warrant, was an unconstitutional seizure and justified the negro in resisting arrest and shooting at the officer.

Citation of similar cases might be multiplied. The cases illustrate the principle that a seizure without a search warrant is unreasonable when an arrest would not be justified without a warrant. The proposition that the evidence which is found justifies the arrest or the seizure is a specious argument and has found no support except in one or two illy considered district court cases. To use a homely phrase, it is an attempt to pull one's self up by his own bootstraps.

If the principles of finding justifying the search be a valid one, it means simply this, that an officer may stop and search every vehicle or foot passenger on the highway and if liquor is discovered the search would be legal. Such practice would, in the words of Mr. Justice Bradley in *Boyd v. United States, 116 U. S., 616; 6 Sup. Ct., 524, 533,* "suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

Not only this, but according to the argument, searches of homes without search warrants would be legalized in case liquor was found. This is exactly contrary to the *Amos case* decided by this court.

In the well considered case of *United States v. Slusser, 270 Fed., 818 (D. C.),* the specious doctrine is disposed of by Judge Peck in very able manner:

> "An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people."
>
> * * *

Section 26 of the National Prohibition Law provides:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle * * * and shall arrest any person in charge thereof." * * *

If the words "shall discover" refer to a discovery by lawful means, the statute adds nothing to the common law power of the enforcing officers. If on the other hand, it is so interpreted to give the officers the right to search any and all vehicles passing on the highway it is clearly in violation of the Fourth Amendment. If it be so construed it is a general warrant a thousand times more sweeping than those issued against Wilkes and his associates by Halifax. In the warrants issued by Lord Halifax, the parties were sometimes expressly mentioned by name and always designated as the publishers of certain matter.

> *Entick v. Carrington, 19 How. St. Tr., 1029.*
> *Leach v. Money, 19 How. St. Tr., 1001.*
> *Wilkes v. Wood, 19 How. St. Tr., 1153.*

It can hardly be conceived that in this country at this time a legislature could be presumed to have intended a drastic and obviously unconstitutional measure, far exceeding the very examples which led up to the adoption of the Fourth Amendment.

The situation is just this; the word "discover" may mean "finding out," "ascertaining" or "detecting." We submit that this is its natural meaning, and not to "examine," "explore" or some other mere action which may or may not result in disclosure. If the later definition is accepted we

have an Act of Congress which is in effect a legislative general warrant addressed to all officers to search all vehicles. That such a provision is unconstitutional is not open to question. In accordance with the general principles that a law must be so construed as to render it constitutional if possible, the former definition must be accepted. The former definition would give the officers no greater authority to search than was permitted at common law.

The right guaranteed to the people by the Fourth Amendment is to be secure in their persons and effects, including their automobiles, against unreasonable searches. Is the stopping and searching of an automobile on the public highway unreasonable? We submit that it is unreasonable unless the officers have a valid search warrant or are in possession of such knowledge as will be sufficient to make a legal arrest of the occupants. The search in the instant cause appears to be based on mere speculation or supposition and was therefore unreasonable, and in violation of the rights of plaintiffs in error under the Fourth Amendment to the United States Constitution.

IV. The Automobile and Liquor Seized Should Have Been Returned to Plaintiffs in Error and the Evidence Obtained Through the Seizure Suppressed.

A. Where Property or Evidence Has Been Obtained Through Unconstitutional Searches and Seizure, Failure to Return the Same and to Suppress the Evidence Learned Thereby Constitutes Reversible Error.

Boyd v. United States, 116 U. S., 616; 6 Sup. Ct., 524.

Weeks v. United States, 232 U. S., 383; 34 Sup. Ct., 341.

Silverthorne Lumber Company v. United States, 251 U. S., 385; 40 Sup. Ct., 182.

Gouled v. United States, 255 U. S., 298; 41 Sup. Ct., 261.

Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266.

Under the holding of *Adams v. United States, 192 U. S., 585; 24 Sup. Ct., 372,* it is necessary that the defendant should move before trial to have the things seized returned, thereby disposing of the collateral question before trial. In *Gouled v. United States,* it was held that failure to make the application before trial was excused when the seizure was made through stealth and the defendant first knew of the seizure when the evidence was offered.

In the instant cause prompt application by the plaintiffs in error was made for return of the articles, first to the United States Commissioner after their arrest, second to the trial court on the third day after the indictment, which application was renewed at the trial. The form of the application is precisely the same as used in the *Weeks case.* Compare pages 3-6 of the printed record with *34 Sup. Ct., 342.* The plaintiffs in error have been diligent in bringing

this matter to the attention of the trial court so that a collateral question at the trial will be avoided.

We are familiar with the cases in some of the state courts and with the statements of law writers, which criticise the holdings in the *Weeks* and other *cases*. Professor Wigmore is perhaps the leader in the criticism of the doctrine of this court. In the second edition of his work on *Evidence, Section 2184,* he advanced the argument that the unconstitutional search should only be grounds of a civil suit against the officer and that any evidence however obtained should be admitted. The futility of a civil action for damages against the officer as a means of protecting the constitutional rights of the accused is pointed out by Professor Chaffee in *35 Harvard Law Review, at page 695.* If Mr. Wigmore's proposition were followed, the innocent man would seldom bring a civil action and the guilty man would receive scant satisfaction at the hands of a jury. The Fourth Amendment would become practically a dead letter.

Mr. Wigmore's proposition might be justified if ours were a land without constitutional guarantees or if the privilege of the people against unreasonable searches and seizures were a mere common law or statutory principle. However this court has repeatedly said since the decision in the *Boyd case* that the constitutional guarantee against unreasonable searches and seizures will be protected to the extent of excluding the evidence illegally obtained provided the question is raised before trial. This is giving to the constitution its full effect. The question is no longer an open one in this court. In addition, the doctrine of the *Boyd* and *Weeks cases* has found support in many well considered recent cases in the state courts under the provisions of the Bills of Rights in the state Constitutions.

Callender v. State, ... Ind., ...; 136 N. E., 10.
State v. Rowley, ... Ia., ...; 187 N. W., 7.
Youman v. Commonwealth, 189 Ky., 152; 224 S. W., 860.

Ash v. Commonwealth, 193 Ky., 452; 236 S. W., 1032.
Helton v. Commonwealth, 195 Ky., 678; 243 S. W., 918.
Mattingly v. Commonwealth, ... Ky., ...; 250 S. W., 105.
People v. Marxhausen, 204 Mich., 559; 171 N. W., 557.
People v. DeLamater, 213 Mich., 167; 182 N. W., 57.
People v. LeVasseur, 213 Mich., 177; 182 N. W., 60.
People v. Vanderveen, 214 Mich., 21; 182 N. W., 61.
People v. Mayhew, 214 Mich., 153; 182 N. W., 676.
People v. Halveksz, 215 Mich., 136; 183 N. W., 752.
People v. Woodward, 215 Mich., 267; 183 N. W., 901.
People v. Margelis, 217 Mich., 423; 186 N. W., 488.
People v. Foreman, 218 Mich., 591; 188 N. W., 375.
People v. Dorrington, 221 Mich., 571; 191 N. W., 831.
People v. Musk, 221 Mich., 578; 192 N. W., 485.
People v. Hertz, ... Mich., ...; 193 N. W., 781.
Tucker v. State, 128 Miss., 211; 90 So., 845.
Butler v. State, 129 Miss., 778; 93 So., 3.
Blacksburg v. Beam, 104 S. C., 146; 88 S. E., 441.
State v. Gibbons, 118 Wash., 171; 203 Pac., 390.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.
State v. Andrews, 91 W. Va., 720; 114 S. E., 257.
Hoyer v. State, ... Wis., ...; 193 N. W., 89.
State v. Jokosh, ... Wis., ...; 193 N. W., 976.
State v. Petersen, 27 Wyo., 185; 194 Pac., 342.

We cite these cases to show that the *Weeks* and other decisions of this court have been followed by the state courts. Most of the foregoing cases were ones in which illegally possessed liquor was obtained as a result of the unlawful search. Some of them, including the recent Michigan cases, involve prosecutions under state laws which have substantially the same provisions as the National Prohibition Act.

In Michigan, Section 31 of Act 336, Public Acts, 1921, provides:

> "No property right of any kind shall exist in any intoxicating liquors had, kept, transported or possessed contrary to law or in or to any receptacle or container of any kind whatever in which said liquors may be found and all such are hereby declared forfeited to the state and shall be seized." * * *

The above statute went into effect May 5, 1921, and hence the cases of *People v. Foreman* and *People v. Hertz, supra,* are decided under its provisions.

In addition, the following cases in the Circuit Courts of Appeals hold that in prosecutions for violation of the National Prohibition Enforcement Act, evidence of liquor obtained by unlawful searches and seizures is inadmissible.

Snyder v. United States, 285 Fed., 1 (C. C. A., 4th Cir.).
Murphy v. United States, 285 Fed., 801 (C. C. A., 7th Cir.).

The Circuit Court of Appeals for the second circuit has announced the same doctrine with reference to the possession of narcotics in violation of national law.

Ganci v. United States, 287 Fed., 60.

B. The Plaintiffs in Error Are Entitled to a Reversal of the Conviction and Return of the Car and Liquor Seized.

We believe that, under the cases cited in A *supra*, plaintiffs in error are entitled (1) to reversal of the conviction against them; (2) return of the automobile seized; (3) return of the liquor seized. However as these questions are somewhat different in their nature, we deem it advisable to examine further in detail and separately each of the three kinds of relief.

(1) The evidence should have been suppressed.

It can be readily seen that the liquor is important in two senses, first as evidence to secure the conviction of the plaintiffs in error and second as a subject of forfeiture. The fact that the liquor was the subject of forfeiture does not make it any more admissible in evidence than if the evidence were only of a documentary nature. This must be clear from the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266.* In that case the defendant was charged with removing whisky on which the government tax had not been paid, to a place other than a government warehouse and of selling whisky on which the tax required by law had not been paid. By examination of the revenue laws then in force it will be seen that the goods seized in the *Amos case* were subjects of forfeiture. See Revised Statutes of the United States, Sections 3450 to 3457, inclusive. Nevertheless this court held that the property should have been returned and the evidence suppressed because the arrest was made without a warrant to arrest defendant or to search his premises.

(2) The automobile should be returned.

It must be remembered that the automobile is not contraband. When lawfully seized, Section 26 of the National Prohibition Enforcement Act authorizes that it be sold by order of the court. When unlawfully seized, however, no right of forfeiture exists. In a well considered opinion in *United States v. Slusser, 270 Fed., 818,* District Judge Peck said, page 821:

> "Lastly, where there is no evidence to warrant the forfeiture of an automobile seized as the vehicle of unlawful transportation, except that obtained upon an unwarranted and unlawful search and seizure and so inadmissible, the automobile cannot be forfeited. There is in such case no competent evidence by which the government can prove its title. Under such circumstances the automobile would have to be returned."

That proceedings for forfeitures must be strictly complied with, requires no citation of authority.

Act of November 23, 1921, c. 134, Sec. 5 (42 Stat., 222, 223), provides:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

The date of the offense in the instant cause was December 15, 1921, and therefore after approval of the above act.

Section 26 of the National Prohibition Enforcement Act (41 Stat., 315), provides the method of forfeiture. In our opinion this excludes a method of forfeiture under Section 3450 of the Revised Statutes pertaining to Revenue Laws.

We are familiar with the decision of this court in *United States v. Statoff* (Jan. 2, 1923), *43 Sup. Ct., 197*, but we believe that as the seizure here was by prohibition agents enforcing the prohibition law, no forfeiture under the old revenue law is justified.

We submit moreover that whether the forfeiture provisions under the Revenue Law would be here applicable or not, the seizure here being unreasonable, and therefore unconstitutional, will not support forfeiture proceedings.

The Revenue Law (Revised Statutes, 3450 *et seq.)*, was in force at the time of the commission of the offense in the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct. 266.* Nevertheless this court held that defendant was entitled to return even of the liquor itself. The forfeiture allowed by the Revenue Law is, if anything more strict than that permitted by Section 26 of the National Prohibition Enforcement Act for the latter requires a conviction of the defendant before sale of the vehicle. We submit that there was and could be no valid conviction of plaintiffs in error in the instant cause. Under the holding of this court in the *Amos case*, the automobile must be returned to the plaintiffs in error.

(3) The liquor should be returned.

Of the state cases which have followed the rulings of this court in the *Boyd, Weeks* and subsequent *cases*, the following have held specifically that liquor unreasonably seized should be returned.

Youman v. Commonwealth, 189 Ky., 152; 224 S. W., 860.

People v. Marxhausen, 204 Mich., 559; 171 N. W., 557.
People v. DeLamater, 213 Mich., 167; 182 N. W., 57.
State v. Andrews, 91 W. Va., 720; 114 S. E., 257.
State v. Petersen, 27 Wyo., 185; 194 Pac., 342.

Furthermore the same principle was followed in the case of *State v. Rowley, ... Ia., ...; 187 N. W., 7*, where illegal instruments were ordered to be returned where they were found as the result of an unreasonable search.

In the following cases under the National Prohibition Enforcement Act decided by the Federal Courts, it has been held that liquor unreasonably seized by officers must be returned.

United States v. Mitchell, 274 Fed., 128 (D. C. N. D., Calif.).
United States v. Armstrong, 275 Fed., 506 (D. C. E. D., Fla.).
United States v. Ray and Schultz, 275 Fed., 1004 (D. C. E. D., Mich.).
Queck v. Hawker, 282 Fed., 942 (D. C. W. D., Pa.).
United States v. Vigneaux, 288 Fed., 977 (D. C., Mass.).
United States v. Harnich, 289 Fed., 257 (D. C., Conn.).

In many of the cases in both the state and federal courts the right of the defendant to return of the liquor is not involved because not prayed for in the petition.

In *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266*, the order of this court included provision for return of the liquor. It is true that in the *Amos case* there was no declaration by statute that there should be no property rights in liquor as here; still provisions in the Revenue Act declared that the liquor should be forfeited to the Federal Government.

While it may be said that plaintiffs in error could have no property rights in the liquor, still they did in fact have possession. That possession was taken from them by unlawful seizure. In order to protect to its fullest extent the constitutional rights to be secure against unreasonable searches and seizures, the court should put the plaintiffs in error back *in statu quo*. The government should gain nothing, the plaintiffs in error lose nothing, because of the unreasonable search. Complete constitutional rights cannot be observed unless not only the conviction is reversed but also the liquor as well as the automobile is returned to plaintiffs in error.

People v. Case, 220 Mich., 367; 190 N. W., 289, is a decision of the Michigan Supreme Court under a prohibition law substantially the same as the National Prohibition Enforcement Act. We do not agree with the decision of the majority of the court which held that under the circumstances of that case the search of an automobile truck, was reasonable. However, the case on its facts, is clearly distinguishable from the instant cause. There the officers looked into a large truck, standing unattended on a fair grounds and from what they saw and smelled concluded that there was liquor in the truck and searched it.

Mr. Justice Wiest delivered a dissenting opinion concurred in by Mr. Chief Justice Fellows and Mr. Justice Bird. The opinion is replete with learning and contains contributions to the historical and political questions involved in the subject of searches and seizures which we believe to be unexcelled even in the decisions in the *Boyd* and *Weeks cases*. The following passage is pertinent to the subject here under discussion and we believe it to be unanswerable:

> "But it is said that property to all liquor is in the state, and therefore it is contraband in the hands of any and all persons, and one cannot have possession thereof so as to fall within the security of the Bill of Rights. Such position is too broad, and contrary

to the provisions of the liquor law itself. If one may not have possession of liquor and be secure within the Bill of Rights, why does the liquor law, in express terms, forbid search and seizure thereof in a dwelling house? Such provision in the liquor law of the state constitutes no boon granted by the Legislature, but is in recognition of the security afforded by the Bill of Rights. So there can be possession of liquor beyond the power of search and seizure under the liquor law. It seems to be thought that, because liquor is declared contraband, and property therein declared to be in the state, one in possession thereof has no rights the officers are bound to respect. It seems to me that this position entirely overlooks the fact that no search warrant can issue in any case to deprive a man of his property, and therefore the only purpose of search warrants, and the only occasion upon which they can issue, is to seize articles unlawfully possessed.

It is idle to say that liquor is contraband, and for that reason cannot be possessed, for, if it was not contraband, and could be lawfully possessed then no warrant could issue for its seizure at all. At common law no power existed to make a search without a warrant. *State v. Welch, 79 Me., 99; 8 Atl., 348; In Re Swan, 150 U. S., 637; 14 Sup. Ct., 225; 37 L. Ed., 1207.* Declaring by statute that no property right exists in intoxicating liquors, and forfeiting such liquors to the state, and commanding officers to arrest any person in charge thereof, must not be read with the eyes shut to the provisions relative to search warrants. If officers, without a warrant, may search where they have suspicion, to whom shall they make a return of the result of the search? Such a roving commission opens the way to oppression and corruption, and rests the security of the individual citizen upon the will of petty officers."

CONCLUSION.

The argument that if contraband is found, evidence thereof is admissible even if the search is unreasonable, is akin to the argument that finding justifies the search and makes it reasonable. Both arguments are attempts to justify an unconstitutional act by the discovery of an unlawful act. This is opposed to the spirit and holding of the *Boyd, Weeks, Gouled* and *Amos cases.* It is further opposed to the twenty-seven well considered cases in the state courts cited in subdivision A of the fourth division of this brief. In almost all of these cases something unlawfully possessed, usually liquor, was unreasonably seized. Yet in accordance with the rule in the *Amos case,* it was held that the evidence should have been suppressed.

This court has held in the *Boyd case* that it would protect the constitutional rights of persons against unreasonable searches and seizures. This court has adhered to the principles and extended, rather than restricted in application in the recent cases. The granting of the relief asked by plaintiffs in error, viz: The reversal of their conviction and the return of the unreasonably seized automobile and liquor involves no material extension of the doctrines already announced by this court.

The Eighteenth Amendment cannot remove the guarantee of the Fourth Amendment against searches and seizures any more than it can take away the right of trial by jury in cases involving liquor violations.

The search was unreasonable. The convictions should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1923.

No. 15
(29,131).

GEORGE CARROLL, and
JOHN KIRO,
Plaintiffs in Error,

v.

THE UNITED STATES,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR ON REARGUMENT.

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BRIEF OF PLAINTIFFS IN ERROR ON REARGUMENT.

PRELIMINARY STATEMENT.

(The references by number contained in this brief refer to the page of the printed record unless the context indicates the contrary.)

Our position is unchanged from that taken in our former brief and upon the prior oral argument. Since then, however, several recent cases of the state courts having more or less application to the instant cause have become available. We deem it advisable to call these to the attention of the court and also to expand somewhat several branches of the previous brief and argument.

ARGUMENT.

I.

The Facts Shown at the Trial For the First Time Cannot Aid the Government as to the Reasonableness of the Search.

The most important question in the instant cause is whether the search, seizure and subsequent arrest of defendants was legal. Naturally the facts surrounding the search are of utmost significance. Defendants twice sought to obtain a return of the property seized and suppression of the evidence because of the illegal manner of the taking.

First, the facts were set before the United States Commissioner who denied the request. On this occasion one of the arresting prohibition officers testified that the officers met defendants traveling in an automobile on the public highway, stopped them, searched the car and found the liquor. The officer further testified that he and his comrades had no warrant and were not on the lookout for defendants and "had no reason to believe that the respondents were transporting liquor" (1-2).

Second, defendants filed separate sworn petitions addressed to the trial court setting up the facts in more detail (3-6). It there appeared that the officers passed defendants and then turned about, overtook and stopped them. The officers then searched the defendants and the

car and at first found nothing. They were about to release defendants when one of the officers struck something hard in the back cushion of the car, tore the cushion cover and found liquor concealed therein.

There never has been any denial on the part of the government concerning the veracity of the petitions. The government filed no counter-affidavits and indeed acquiesced in the facts as set forth in the petitions. There was absolutely no showing or claim of any grounds of suspicion on the part of the officers prior to the discovery, that defendants were violating the law. There was no suggestion that there was anything in the appearance, manner, former conduct or reputation which led the officers to suspect defendants. The petitions were heard by the court in advance of the trial and denied (6).

We respectfully submit that upon the facts that were virtually agreed upon, the search was unreasonable. Such a search cannot be justified unless the officers had visitorial power to stop and search *all* automobiles traveling on the public highway. The government expressly disclaims any such visitorial power but now contends the search was reasonable because the officers knew defendants were selling liquor. (See pages two, seven and ten of the government's original brief). This claimed fact was not shown at any time and nothing whatever of that nature was claimed until the trial. Upon the trial two of the officers claimed that three months prior to the arrest defendants and a third man had agreed to sell one of them a quantity of liquor but later came back and said they were unable to obtain it (8, 11). Defendants objected to this testimony and took exception to its admission (8) and assigned error thereon (16, 17).

We wish here to renew and urge most strongly upon the court that the matter of reasonable search must be determined according to the facts as they appear upon the preliminary motion to suppress the evidence. This court held in *Adams v. United States, 192 U. S., 585; 24*

Sup. Ct., 372, that the accused cannot raise the point of unreasonable search at the trial, because of the collateral issues which would be involved. This court has always insisted that the application must be timely, although in the case of *Gouled v. United States, 255 U. S., 298; 41 Sup. Ct., 261,* failure to make application before trial was excused when the seizure was made by stealth and the accused first knew of it when the evidence was offered.

In the instant cause the government knew the facts fully as well on the occasions of the preliminary hearing and the motion before the trial court, as it did at the trial. Officer Scully who at the preliminary hearing swore that the officers had no reason to suspect appellants (1-2), was one of the witnesses who testified to the attempted purchase of liquor on a prior occasion (8).

The admission of the evidence concerning the prior attempted purchase of liquor by one of the officers had absolutely no relevancy to the guilt of the defendants on the charge then being tried. Even if it were relevant, it was clearly incapable of assisting the government's claim that the search was reasonable.

Under the "timely application" rule of this court, appellants could not contend for the first time at the trial that the search was unreasonable and the discovered evidence inadmissible. We apprehend that this rule is reciprocal and that the government cannot be aided at the trial by evidence tending to show the search reasonable. The whole question of reasonableness or unreasonableness must be determined upon the showing made upon the hearing of the petitions.

Any other ruling would absolutely shatter all the plausibility of the "timely application" rule of this court. This rule is maintained in order that collateral questions at the trial should be avoided. Can the accused be required to avoid collateral issues at the trial and the government be permitted to raise the same collateral

issues? Unless this court is prepared to expressly overrule the case of *Adams v. United States*, we believe it cannot consider the government's showing at the trial upon the question of reasonableness.

In addition, the defendants were unfairly surprised at the trial. It must be observed that they made no defense upon the merits and rested solely upon the proposition that the evidence was obtained through unconstitutional search. Naturally they felt that the questions concerning the reasonable search had been determined before the trial was begun. The government showed no indication before trial of insisting on other facts on the question of reasonableness and the testimony of officer Scully before the commissioner expressly acquiesced in the facts as set forth in the petition. Consequently the appellants did not come to the trial prepared to show facts in denial or explanation of the testimony relative to the prior attempted purchase of liquor. It may be suggested that the testimony of Kruska, the third person said to have been present on the prior occasion (11), might have had considerable force. Even if the government's evidence were not collateral to the issues at the trial it is a clear instance of unfair surprise to the appellants. Defendants were distinctly misled by the government's former position and were justified in the belief that the facts regarding reasonableness were not to be questioned at the trial.

In passing we wish to remind the court that the immediate circumstances of the search as set forth in the petition were not questioned, but were reiterated by the officers at the trial. There is no difference in the stories except that there was testimony at the trial of the attempted purchase of liquor, two and a half months prior to the search, and a trifling incident concerning the officers having seen defendants a week thereafter on the highway with the car which was searched.

We believe that even if the facts shown for the first time at the trial are considered, the arrest and search will ap-

pear unreasonable. However, these facts should not be considered and without them the search is so clearly unreasonable that the government concedes this in its brief.

II.

The Arrest Was Illegal.

The arrest in this case was without a warrant (1); no warrant was issued until the day after defendants were arrested (1). That a warrant issued after an illegal arrest cannot make the arrest lawful requires no argument.

When an arrest is made without a warrant, the burden is on the officers to show legality of the arrest. At common law a distinction was made between arrest without warrant in the case of felony and in the case of misdemeanor. While an officer might arrest one upon reasonable grounds of suspicion that he had committed a felony, the officer could not arrest for a misdemeanor unless the offense was committed in his presence.

The above is the common law rule.

Kurtz v. Moffit, 115 U. S., 487.
John Bad Elk v. United States, 177 U. S., 529.
Drennan v. People, 10 Mich., 169, 187.
Sarah Way's Case, 41 Mich., 299.
State v. Lutz, 85 W. Va., 330;101 S. E., 434.
State v. Wills, 91 W. Va., 659; 114 S. E., 261.

The three last mentioned cases maintain that the misdemeanor must not only be committed in the officer's presence but must also amount to a breach of the peace in order to justify an arrest without a warrant.

No federal statute sets forth the circumstances under which an officer may arrest without a warrant. Under Section 28 of the National Prohibition Act, 41 Stat., 316,

taken in conjunction with Section 788 of the Revised Statutes, a prohibition agent would have the same authority to arrest without a warrant, as a state officer.

This offense was committed in the state of Michigan; consequently we look to the law of that state. There appears to be no statute in Michigan upon the subject. *Sarah Way's Case, 41 Mich., 299,* however, adopts the common law rule outlined *supra.*

In the instant cause we can dismiss with a word the branch of the rule referring to felonies. The offense here was not a felony. Moreover there were no grounds for belief that a felony had been committed. Indeed officer Scully's testimony is to the effect that there was no reason to believe that *any* offense had been committed (1, 8). Cronenwett's testimony is to like effect (13).

In the instant cause the facts show that neither of the elements necessary for an arrest without a warrant for a misdemeanor exist in the instant cause. In misdemeanors, the offense must amount to a breach of the peace and also must be committed in the presence of the arresting officer. It is scarcely open to question that the offense in the case at bar was not a breach of the peace. This fact alone makes the arrest here under consideration illegal according to the Michigan rule.

Moreover the offense was not in legal contemplation committed in the presence of an officer. In the government's original brief it is contended that as the possession and transportation was going on, at the time of the arrest, it was committed in the presence of the officers. Cases are cited in the course of the argument but not one of them sustained the contention.

The true rule, as stated in our former brief (pages 12-15) is that unless the offense is discoverable without a search, it is not in legal contemplation committed in the presence of the officer.

In addition to the cases cited upon our former brief, the very recent case of *State v. Pluth (Minn.)*, *195 N. W., 789*, is directly in point.

The facts in that case are almost identical with those in the instant cause. Defendant, driving toward Duluth with two companions, and the officers driving out of Duluth met on the highway. As the road was bad, defendant turned to side of the road to permit the officers' car to pass. One of the officers recognized defendant and they also stopped. Some conversation took place and one of the officers rushed up, opened the curtains and searched the car and discovered liquor. There was a statute, declarative of the common law, that an officer might arrest without a warrant for an offense "committed or attempted in his presence." The court said:

> "The crime charged against defendant is punishable only by a fine and imprisonment in the county jail, and therefore is not a felony under our statute. See Section 8466, G. S. 1913. Consequently the officers could not lawfully arrest him therefor without a warrant, unless the offense was committed or attempted in their presence. It cannot be said that a criminal offense is committed in the presence of an officer unless the acts constituting the offense become known to him at the time they are committed through his sense of sight or through other senses. Although a person may actually be committing a criminal offense, it is not committed in the presence of an officer within the meaning of the statute, if the officer does not know it. And where the officer could not observe nor become cognizant of the act constituting the offense by the use of his senses it could not be committed in his presence so as to authorize an arrest without a warrant."

III.

The Search and Seizure Were in Violation of the Constitutional rights of Plaintiffs in Error.

The Fourth Amendment to the Constitution is broader than the maxim, "A man's home is his castle." This proposition was distinctly recognized by this court as early as *Ex parte Jackson, 96 U. S., 727,* where it was held that opening of a sealed letter in the mails violated the Fourth Amendment.

It will be noted that not only houses but persons, effects and papers are guaranteed protection. The government or its agencies cannot violate the security or privacy of any of these four objects. They are separated in the text of the Amendment only by commas and unreasonable searches and seizure of each are equally forbidden.

There are two possible ways that a search can be reasonable without a warrant; first, after legal arrest, the person may be searched; second, there are a few examples of a general visitorial power to search.

The search and seizure in the instant cause cannot be justified as a search after legal arrest for two reasons. In the first place the search preceeded the arrest (2, 4, 5, 13, 9). It requires no extended discussion to show that an arrest cannot be grounds for a search which preceded the arrest. In the instant cause the result of the illegal search was the grounds upon which the arrest was made. Two well considered cases have shown that such an arrest will not justify the search.

> *People v. Margelis, 217 Mich., 423; 186 N. W., 488.*
> *State v. Pluth (Minn., 1923), 195 N. W., 789.*

But even if the arrest had preceded the search, the latter would have been unreasonable. A search after an

illegal arrest is unreasonable. This proposition is fully maintained by the many cases cited on pages 17-25 of our original brief, and by the recent case of *State v. Pluth (Minn., 1923), 195 N. W., 789.*

There are a few examples of visitorial power of officials to search. They are exceptions and are reasonable only because of the peculiar circumstances under which they are permitted. General executive or judicial warrants to search are void at common law as seen by the *Wilkes cases,* and are expressly forbidden by the constitution. General warrants of authority to search granted by the legislature would be even worse because their nature would necessarily be more sweeping than executive or judicial warrants and hence more capable of abuse on the part of numerous hordes of petty officials.

In two instances officers are granted visitorial powers. Customs officers are granted power by Congress to search persons and property for dutiable goods (R. S., 3059). This is a devise necessary for the collection of customs and may be said to be a right which the government exercises over individuals in exchange for the privilege of entering the territory of the United States. Moreover it is not readily capable of abuse for the searches are ordinarily made only at points of entry and under the supervision of responsible superiors. It is true also that by Section 3061 of the Revised Statutes persons and vehicles may be searched by customs officers outside the customs house. This is for the obvious purpose of reaching dutiable goods which have escaped the payment of duty by evasion. No case has determined its constitutionality. It is extremely doubtful if evidence thus obtained by customs officers could be lawfully used in a criminal prosecution. Moreover customs officers were limited in number. The power was never given to internal revenue officers, who had however, a right to inspect distillers, etc., without a warrant. (R. S., 3177). Federal prohibition agents were not granted the right of customs officers but of internal revenue officers only (41 Stat., 316). This indi-

cates a clear legislative intent to deny to prohibition agents, the right without a warrant to search persons and vehicles traveling on the highway.

Nor have prohibition agents the right to search all vehicles in order to discover violations under the provisions of Section 26 of the National Prohibition Law which says that when any officer "shall discover" a person in the act of transporting liquor, he shall seize the liquor and arrest the person in charge.

We have discussed at some length in our former brief, pages 26-27, the meaning of that language. Our position is sustained by a New York case under an identical statute. *State v. One Hudson Automobile, 190 N. Y. Supp., 481, 482, 483.* While the opinion is of little weight as authority we quote it because of the intrinsic worth of the reasoning.

> "It is the manifest intent of these provisions that, when an officer actually finds or discovers the direct proof of illegal possession or transportation, he may seize, without warrant, except where the place is a private dwelling; but it is not entirely clear that the Legislature intended to authorize a search, as the means of discovering or finding, without warrant and without process of any kind.
>
> * * *
>
> In other words, if an officer actually sees or has before him direct tangible proof that liquors are being transported unlawfully in a given vehicle, he may seize that vehicle and the contents thereof and arrest the person in charge. In such a case he finds or discovers within the meaning of the statute. But if he merely suspects or believes, or without suspicion or belief seizes and searches for the purpose of obtaining knowledge, his act is unjustified and unwarranted by the statute; for if the statute should be otherwise construed it would be, in my opinion, unconstitutional and void."

Reaching the same conclusion is an able article entitled: "A New Discovery," by George L. Hunt, 9 A. B. A. Jo., 321.

Given any other construction than we do to the word "discover," Section 26 must be unconstitutional.

A fortiori no search can be justified on common law principles. The well considered cases indicates that an officer has no right to search a vehicle traveling on the public highway.

Butler v. State, 129 Miss., 778; 93 So., 3.
Taylor v. State, 129 Miss., 815; 93 So., 355
State v Pluth (Minn., 1923), 195 N. W., 789.
Hoyer v. State (Wis.), 193 N. W., 976.
State v. One Hudson Automobile, 190 N. Y. Supp., 481.
State v. Gibbons, 118 Wash., 171; 203 Pac., 391.

United States v. Bateman (1922, S. D. Cal.), 278 Fed., 231, is quoted at length in the government's brief and is evidently much relied upon as establishing a general visitorial power over automobiles. We submit that the reasoning in that case is fallacious because it goes upon the ground that the 18th Amendment must be enforced at all costs. The 18th Amendment must be enforced but the constitutional guaranties of the first ten amendments must be observed in that enforcement. The mere fact that general searches of vehicles may help to enforce the 18th Amendment does not make those searches reasonable.

Conceivably it might be permissible for an officer to search a vehicle before an arrest in cases where the arrest of the occupants might be justified without a knowledge of the facts learned through the search. This would be placing the cart before the horse, however, and we urge that this court disapprove of such a practice. If the officer clearly knows facts sufficient to justify an arrest, he should make the arrest first and the search afterward.

This procedure would preclude such "fishing expeditions" as we have in the instant cause. It is indeed a fair question to ask in the instant cause, "if the officers had reasonable grounds for the search, why did they not arrest respondents first and search afterwards?"

On the showing made before the trial there was no grounds prior to the search at all for the belief on the part of the officers that appellants were committing an offense. Upon these facts, the search was made upon a mere venture. Is a search upon mere venture reasonable? The very purpose of the Fourth Amendment was to prohibit capricious examinations on the part of petty officers.

Searches of vehicles on the highway will if promiscuously permitted lead to great abuses. Innocent persons will be stopped by highwaymen simulating officers. The search will extend to everyone. The doctor making his rounds, the milkman on his route, yea even the rural postman will be forced to stop and submit to indignities of persons who are or pretend to be prohibition officers. No doubt there are many violations of the prohibition laws but they must be curtailed by some other method than that of wholesale search without warrant. The disease may be bad but the cure is worse; it is unreasonable and hence violates the Fourth Amendment.

Even if this court will consider the fact shown for the first time at the trial that respondents once agreed to sell officer Cronenwett liquor and later came back and said they could not get it, there was no reasonable ground for an arrest or a search. There was no reason to believe that on this occasion the respondents were transporting liquor. No prior offense had been committed. At the best, there had existed a willingness to commit a liquor violation. It was not shown that respondents ever had the ability to complete the sale. The prior incomplete offense was of an entirely different nature than the one for which respondents were arrested. The first was a contemplated sale in Grand Rapids of liquor to be obtained

in that city. The latter was transportation of liquor toward Grand Rapids at a point thirty miles distant therefrom. The officers did not claim to know that respondents were regularly engaged in the business of selling liquor in Grand Rapids and there is no chance for any inference that the officers knew or had reason to suspect respondents of transporting liquor into Grand Rapids from distant points. In addition there is remoteness in point of time. The arrest was almost three months after the attempted purchase. Suppose that the officers had the time after seeing the respondents, to go before a magistrate to obtain a search warrant. Would the prior attempted purchase in September be "probable cause" for belief that respondents were committing an offense of an utterly different nature in December?

Let us take a hypothetical case. Suppose an officer overhears a wealthy club man trying unsuccessfully to purchase a quantity of liquor. Could that same officer secure a search warrant three months later for a search of that wealthy club man's home? Or could the officer after such a period of time stop the club man's automobile on the way to his golf course and conduct such a search as was made in the instant cause? To ask these questions is to answer them and the situation is identical in all material respects in the case at bar.

IV.

The Evidence Should Have Been Suppressed and the Liquor Returned.

We cannot believe that this court is contemplating overruling the principle announced in *Weeks v. United States.* It is true that some of the state courts have declined to follow that case, due chiefly to Mr. Wigmore's criticism of the rule. It is true that Mr. Wigmore is the greatest authority of all time upon the subject of evidence. However he does not weigh constitutional guaranties with his usual keenness. Believing generally that all relevant evidence should be admissible unless expressly forbidden, he announced the doctrine that illegal source of evidence is no ground for its rejection.

True the Fourth Amendment merely forbids officers to make unreasonable searches and does not expressly declare the evidence learned thereby inadmissible. However this court has wisely concluded that neither civil nor criminal proceedings against the officers will satisfactorily enforce the Constitution. Suits will rarely be brought by either the guilty or the innocent whose rights have been violated, because little or no damages can ordinarily be recovered. This court has wisely decided that the constitutional guaranty will be further protected by taking away all incentive to make illegal searches. The incentive is removed by declaring that the things seized must be returned and the evidence suppressed. This is the only method of putting life into the words of the Fourth Amendment.

This court's wisdom in so holding is well shown by recent experience. An amendment to the National Prohibition Law, Ch. 135, Section 6, passed Nov. 23, 1921, 42 Stat., 223, provides for punishment for an officer who makes an illegal search. Up to the present time there is

no reported case in which an officer has been punished under its provisions. Cases abound where unreasonable searches are made. The absence of reported cases punishing officers shows that this court's position is thoroughly justified.

It is not true that the great weight of authority in the state court is opposed to *Weeks v. United States.* On pages 29-30 of our brief, cases are cited showing that the *Weeks'* doctrine is followed in ten states, viz: Indiana, Iowa, Kentucky, Michigan, Mississippi, South Carolina, Washington, West Virginia, Wisconsin and Wyoming. To these can be added others which either expressly hold or clearly indicate that they favor the *Weeks'* doctrine.

Atz v. Andrews (Fla., 1922), 94 So., 329.
State v. Myers, 36 Ida., 396; 211 Pac., 440.
People v. Brocamp, 307 Ill., 448; 138 N. E., 728.
State v. Harris, Mo. App., ; 250 S. W., 925.
State v. Dist. Ct., 59 Mont., 600; 198 Pac., 362.
State v. One Hudson Automobile (1921), 190 N. Y. Supp., 481.

Several of the cases which oppose the doctrine of *Weeks v. United States,* are somewhat influenced by the fact that the possession of contraband goods is involved.

People v. Case, 220 Mich., 369; 190 N. W., 289.
Owens v. State (1923, Miss.), 98 So., 233.
City v. Walser, 45 S. D., 417; 187 N. W., 821, 823.
Rosanski v. State, 106 Oh. St., 442; 140 N. E., 370.
State v. Chuchola (Del., 1923), 120 Atl., 212.
State v. Simmons, 183 No. Car., 684; 110 S. E., 591.

In the government's original brief, pages four and five, this position is maintained. The government puts considerable reliance upon certain remarks of Mr. Justice Bradley in the case of *Boyd v. United States, 116 U. S., 616, 623.* But the court in that case did not say that any search and seizure of contraband was legal. The *Boyd cases*

involved the right to obtain documents by subpoena *duces tecum*. When read in the light of the case of *Gouled v. United States, 255 U. S., 298, 308-309,* it becomes apparent that even searches for contraband must be reasonable.

In the jurisdictions which recognize the doctrine of the *Weeks case,* however, the great weight of authority is that the rule applies to seizure of contraband as well as to papers and other property. See *State v. District Court, 59 Mont., 600; 198 Pac., 362, 367,* and the many cases in our former brief, particularly on pages 34-35. The *Weeks case* indeed is itself authority against any distinction, for contraband lottery-tickets were ordered returned. Moreover in the case of *Amos v. United States, 255 U. S., 313; 41 Sup. Ct., 266,* there was an order for the return of illicitly manufactured liquor which under the provision of Revised Statutes 3450-3457 was contraband.

The prevailing opinion in *People v. Case, 220 Mich., 369; 190 N. W., 289,* is ably answered by the dissenting opinion of Mr. Justice Wiest which is found on pages 36-37 of our original brief. That Michigan no longer adheres to the distinction between seizure of contraband and other property must be apparent from the following later Michigan cases in which evidence of contraband illegally seized is ordered suppressed.

People v. Musk., 221 Mich., 578; 192 N. W., 485.
People v. Hertz, 223 Mich., 170; 193 N. W., 781.
People v. Preuss, Mich., ; 195 N. W., 684.

The security of innocent persons and their papers, houses and effects is just as much threatened in case the officers are looking for contraband, as in case they are looking for evidential papers or lawful property. The rule in the *Weeks case* loses all its force if indiscriminate searches for contraband are encouraged.

V.

The Search Was Unlawful as to Both Defendants.

In the government's original brief, pages 19-20, it is contended that even if Carroll's rights were violated, Kiro's were not, for the reason that the petitions of both stated that the liquor and automobile belonged to Carroll only. This argument goes to the very root of the Fourth Amendment. The amendment guarantees the people security in their persons, houses, papers and effects. In other words it recognizes a right of privacy in these things which the government cannot infringe in an unreasonable manner. It is not necessary that things searched or seized should be owned by the accused in order that his rights be violated by an unreasonable search. It is sufficient if the accused's privacy in his person, or effects is violated. So far as the liquor is concerned there could be no property right even in Carroll for Section 25 of the National Prohibition Law expressly forbids. Both defendants were convicted on the theory that they were in possession of liquor. Both were engaged in the same enterprise. Kiro was driving the car (12). The privacy of his person was just as much invaded by the search as if the car had been owned by him. If a man is wearing a borrowed suit of clothes, his personal privacy is as much infringed by a rifling thereof as if he had owned the suit. We submit that within the meaning of the Fourth Amendment the search of an automobile in which one is driving is as much an infringement of his privacy of person as to search the clothing which he is wearing or the grip which he carries in his hand.

In addition it must be remembered that Carroll and Kiro were jointly indicted and tried. If the evidence were returned to Carroll as it should have been, it could not have been used to convict Kiro. The rights which belonged to Carroll naturally and of necessity inured to Kiro.

The cases cited on page 19 of the government's brief as supporting their contention are not in point for in those cases, no one was entitled to return of the property. *Wilson v. United States, 221 U. S., 361,* and *Drier v. United States, 221 U. S., 394,* were both cases in which corporate books were obtained by subpoena *duces tecum.* Of course the privilege against self-incrimination does not apply to corporations, so there was no person in existence who could be entitled to a return of the books. *Hayward v. United States (1920), 268 Fed., 795,* is a rather curious case in which papers of a voluntary association were unreasonably seized. Evidently upon the entity theory of such association, it was decided that the members of a voluntary association had no legal interest in the documents sufficient to demand a return thereof. Granting the premise of the theory adopted, the case is correctly decided but has no application to the instant cause.

CONCLUSION.

We believe that under the "timely application" rule of this court, evidence to aid the government on the question of reasonableness of the search, comes too late if offered for the first time at the trial. The government cannot possibly succeed in this case unless evidence at the trial is considered. But even if the government may be aided by the evidence at the trial, the facts applied to the existing law clearly shows that the search was unreasonable as to both defendants. The convictions must accordingly be reversed.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GEORGE CARROLL AND JOHN KIRO, PLAINTIFFS IN ERROR,
v.
THE UNITED STATES OF AMERICA. | No. 117.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR THE UNITED STATES.

STATEMENT.

George Carroll and John Kiro, the plaintiffs in error (hereinafter called the defendants), on September 29th, 1921, while in the apartment of a Federal prohibition agent, who previously knew them by sight (R. 8), at Grand Rapids, Michigan, agreed to sell three cases of whisky to another Federal prohibition agent. (R. 8, 9, 11.) The defendants, however, failed to deliver the liquor. They were then using an Oldsmobile roadster, the appearance and license number of which was noted by such agents. Later, to wit, on December 15th, 1921, the same agents while patrolling the road between Grand Rapids, Michigan, and Detroit, Michigan, on the lookout for violators of the National Prohibition

Law, recognized the defendants coming towards Grand Rapids in the Oldsmobile roadster. The agents knowing, from the previous transaction in September, and having followed the car on the same road on October 6 (R. 8), that the defendants were in the business of selling whisky, and seeing them coming on a road and in the direction used by violators of the Prohibition Law, when carrying their contraband, stopped them. A search of the automobile revealed sixty-eight bottles of whisky concealed behind the upholstery of the back seat. The defendants were arrested, and the liquor was seized.

The defendants' motions for the return of the liquor were denied, and they were convicted for unlawfully transporting spirituous liquor and were fined $500 each. A count in the indictment alleging unlawful possession was withdrawn from the jury by the court. (R. 15.) They have sued out this direct writ of error from this Court.

ASSIGNMENTS OF ERROR.

The assignments of error number 6. (R. 16.) They may be properly condensed into the following:

1. The search made by the Federal prohibition agents was unlawful and the liquor seized was used in evidence in violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States. (Assignments 1 to 5 incl.)

2. The trial Court erred in admitting in evidence certain testimony of one of the prohibition agents as to a conversation which

had taken place in his apartment on September 29th, 1921, between the defendants and another agent.

ARGUMENT.

I.

The search was lawful because reasonable.

The assignments of error herein present for consideration the Fourth, Fifth, and Eighteenth Amendments to the Constitution of the United States. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment provides that no person "shall be compelled in any Criminal Case to be a witness against himself." The Eighteenth Amendment, sec. 1, provides:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The question more directly and concretely stated is, was there an unreasonable search made and there-

fore one which was unlawful because forbidden by the Fourth Amendment? The customary investigation into the reasonableness or unreasonableness of a search is usually prefaced by an historical survey of the issuance of, and opposition to, general warrants and writs of assistance. Such a survey although helpful offers no solution to the present situation. Conditions have changed since the days of John Wilkes and James Otis, when the victims of searches were often contending against a tyrannical government. This age with its fast-moving automobiles and flying machines, together with its little less marvelous agencies of communication make the administration of criminal law—the detection of crime—so difficult that no unnecessary obstacle should be permitted to hinder the Government in the enforcement of its laws. Moreover, the law here under administration, we contend, is of peculiar importance for the reason that it is the expression of Congress in obedience to a special and particular section of the Constitution of the United States, namely the Eighteenth Amendment. In considering a search influenced by such circumstances the question of reasonableness takes on a newer and a more important significance.

The *Gouled*, *Silverthorne*, and *Weeks* cases can not be here used as authorities. Those cases involved the search and seizure of papers, and papers of evidenciary value only. *Gouled* v. *United States* (1920), 255 U. S. 298; *Silverthorne Lumber Co.* v.

United States (1919), 251 U. S. 385; *Weeks* v. *United States* (1913), 232 U. S. 383. Congress has nowhere said that one shall not possess papers. But the case in question concerns contraband, an instrument of crime, a *res* which it is criminal to possess and transport. Title II, section 26 of the National Prohibition Act.

This distinction is important. It has been made by this Court. Mr. Justice Bradley points out the distinction in *Boyd* v. *United States* (1885), 116 U. S. 616, 623, as follows:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof, are totally different things from a search and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto caelo*. In one case, the Government is entitled to the possession of the property; in the other it is not. * * * and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized * * * by our own revenue acts from the commencement of the Government.

To the same effect are the remarks of Mr. Justice Day, in the case involving the search and seizure of papers, in *Weeks* v. *United States* (1913), 232 U. S. 383, 392, where he says:

> What then is the present case? Before answering that inquiry specifically, it may be

> well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. * * * Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

Nor is the *Amos* case controlling. In that case the search was made of the home of the defendant. *Amos* v. *United States* (1920), 255 U. S. 313. It can not be justly claimed that the privacy of one's automobile on a public highway is analogous to or in the same classification as the privacy of one's home. Visitorial power over, and the inspection of, an automobile on the public highway by officials is no new thing. It has long been accepted as one of the many restraints made necessary by social convenience and safety. The public highways are under the constant supervision and control of officers of the law. May a criminal travel along a public highway, hide his contraband under a blanket or behind a seat, violate the law, and smile defiantly at the officials commissioned to prevent such offenses? We submit that the theory of the sanctity of the castle will permit no such interpretation of the law here involved.

Searches without warrants are taking place constantly and are not questioned because they are recognized as reasonable. The legality of searches made by custom officers has not been questioned.

Internal revenue officers could have legally searched the automobile in question in order to ascertain whether or not the revenue laws were being violated. The Act of July 18, 1866, R. S. Sec. 3061, provides:

> Any of the officers or persons authorized * * * may stop, search, and examine, as well without as within their respective districts any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, * * * and to search any trunk or envelope, wherever found, in which he may have reasonable cause to suspect there is merchandise which was imported contrary to law * * *, he shall seize and secure the same for trial.

See also statement of Mr. Justice Bradley in *Boyd* v. *United States, supra.*

The Government, however, does not contend that the presence of an automobile on a highway in itself is sufficient to make a search of it reasonable. But it is submitted that there are additional elements in this case which made the search reasonable. The agents knew that the defendants were selling whiskey, and found them coming on the road and from the direction whence violators of the prohibition law were in the habit of carrying liquor. That knowledge with the concurrent circumstances made the search as reasonable as is considered to be a search made by revenue officers at places of entry.

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II.

A consideration of the law of arrest.

Another solution of the problem may be had by a consideration of the law of arrest. The defendants were committing a crime by transporting the liquor. An officer, at common law, and often by statute has authority to arrest, without a warrant, if a misdemeanor is being committed while he is present. I Wharton, *Criminal Procedure* (10th Ed., 1918), Sec. 35; *Burroughs* v. *Eastman* (1894), 101 Mich. 419; Title II, sec. 26, National Prohibition Act. In case of a felony he can make an arrest without a warrant whether or not it occurred while he was present.

The rule may be more accurately stated as follows: An officer may arrest without a warrant when a crime, either a felony or misdemeanor, is committed and is still incomplete while he is present. If the crime is past and complete before an arrest is made, it is lawful only if the crime is a felony, and unlawful if it is a misdemeanor.

The phrase commonly used to express the rule that an officer may arrest one committing a misdemeanor if it were a present and an incompleted one, is that it must be committed "in his presence." That expression has led to speculation concerning the meaning of "in his presence," and as to what physical senses the officer is permitted to use in order to determine whether or not a crime is being committed in his presence. It is submitted that the application of such a test is erroneous.

The only question to be considered by the court in determining the reasonableness of an arrest is, was it contemporaneous with, so as to be almost instantaneous with, the commission of the crime? If the crime was incomplete and a continuing one, as in the instant case, when the officer made the arrest, it was a lawful arrest.

An illustration will show the fallacy of the other statement of the rule. A misdemeanor is committed in the view of an officer, but the officer prefers not to make the arrest until some few hours elapse, and when the crime is past and completed. Such an arrest, without a warrant, would unquestionably be unlawful. I Wharton, Criminal Procedure (10th Ed. 1918), sec. 37; *Pow* v. *Beckner*, 3 Ind. 475; *Muscoe* v. *Commonwealth* (1890), 86 Va. 443. The true test then is, was the officer present, when the crime was being actually committed, or so recently committed as to be considered a present and not a past one? If he was so present while the crime was incomplete, was continuing, then the arrest was lawful, and any inquiry as to the use of his senses is not warranted.

Title II, Section 26, of the National Prohibition Act gives a Federal prohibition agent the power to arrest, and reads, in part, as follows:

> Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle

or team or automobile, air or water craft, or any other conveyance and arrest any person in charge thereof.

The prohibition officers therefore had the power to arrest when the misdemeanor was being committed; and when an arrest is made an officer may search the prisoner, his surroundings, and his possessions. *Dillon* v. *O'Brien* (1887, Exch.), 16 Cox C. C. 245; *Smith* v. *Jerome* (1905, Sup. Ct.), 47 Misc. 22; 93 N. Y. Supp. 202.

Therefore, in the instant case, as a crime was being committed, and the officers were present while it was continuing, the arrest made was lawful and so also the search. An inquiry into the mental process used by the officers in making the arrest in order to ascertain if the rule "in the presence of" was satisfied, is also fully met, in the instant case, for the information possessed by the officers concerning the propensities of the defendants, and their presence on a "bootlegger's" road gave the officers reasonable grounds to believe that a crime was being committed.

III.

Similar searches have been held to be reasonable by other courts.

Searches similar to the one in question have been held reasonable by other courts; and the opinions rendered in those cases seem so sound that they may assist in the determination of this case.

In *United States* v. *Bateman* (1922, S. D. Cal.), 278 Fed. 231, the opinion of the court is as follows:

> The question raised by this motion is whether or not a prohibition enforcement officer can stop an automobile on a public highway and search it for intoxicating liquors, without the consent of the driver of the automobile, and without a warrant for arrest or search. This proposition involves the interpretation of the Fourth, Fifth, and Eighteenth Amendments to the Constitution of the United States. These amendments are of equal force and importance. It is plain that the Eighteenth Amendment can not be enforced without legislation to enforce it * * *.
>
> Congress on a previous occasion had expressly authorized custom officers to search for goods supposed to be in the United States in violation of the custom laws. These laws were in effect at the time of the adoption of the Eighteenth Amendment. The Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment. If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure as disclosed in this case. In order, therefore, to enforce the Eighteenth Amendment it is necessary for us to determine what is an unreasonable search or seizure.
>
> In adopting the Volstead Act (41 Stat. 305), Congress took into consideration the question

of the right to search and seize certain conveyances. In section 25 of the Volstead Act there is this provision:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

Here is an expression of Congress to the effect that in certain instances search warrants shall not be permitted. If Congress had been of the opinion that to search automobiles on a public highway without a search warrant was unreasonable, it certainly would have included, with the prohibition as to dwellings in section 25, a prohibition as to automobiles.

Congress had the matter directly before it when it enacted section 26, which contains the following language:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

It has been held by one court that that authorized the search and seizure of an automobile transporting liquors in violation of the law. *U. S.* v. *Crossen* (D. C.), 264 Fed. 459, 462. In the act of Congress approved November 23, 1921, section 6 provides as follows:

"That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor."

Again, if Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its conviction, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without reasonable cause.

It is my opinion that there is no legislation of Congress upon the subject of searches and seizures of automobiles except as above specified, and the court must in each individual case determine, as a judicial question, whether or not the search and seizure of an automobile is an unreasonable search or seizure, in view of all the circumstances in the case.

Let us now proceed to consider as a judicial question in this case whether or not it was an unreasonable search or seizure for the officer to have proceeded as he did without a search warrant. The Eighteenth Amendment went into force in January, 1919, and the first section reads as follows: * * *

There is now and has been ever since this amendment went into effect almost a continuous stream of automobiles from at or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a search warrant, the country, of course, would be flooded with intoxicating liquors, unlawfully imported. It is contended that the officers have no right to stop a person carrying a suit case or satchel to search for intoxicating liquors, on the ground that that would be a violation of the Fourth and Fifth Amendments to the Constitution. If a suitcase or satchel could not be searched and seized without a search warrant, a tin container, jug, or bottle could not be taken away without a search warrant from a man carrying it. If an automobile, a suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant under the law can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it. Such an affidavit can not be made upon information and belief, but must be positively sworn to. Before a search warrant could be obtained, of course, the effect to be searched would be out of reach. Any person must necessarily reach this conclusion.

Under those circumstances the Eighteenth Amendment would have been stillborn. The act of more than two-thirds of the House of Representatives, more than two-thirds of the United

States Senate, in passing such Eighteenth Amendment, and all the States of the Union, with the exception of the two smallest, in approving the Eighteenth Amendment, would have been utterly futile, and would have brought about only chaos and confusion. At the time Congress passed the last act above referred to automobiles had been seized by the hundreds without a search warrant. Containers of alcohol had been seized by the thousands without a search warrant. Therefore, if Congress had been of the opinion that it was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures, instead of leaving it to the courts to decide. I think the failure of Congress to act in this matter is a tacit approval of the many acts which had occurred prior to November 23, 1921, and that automobiles might be searched.

Judge Bourquin, in the case of *United States* v. *Fenton* (D. C.), 268 Fed. 221, places the right to search an automobile upon the ground that as soon as the liquor is transported in violation of the law it is forfeited to the United States, and that the United States is then vested with the property and possession thereof; that the transporter has no right in the property, and, therefore, he cannot object to its being used in evidence. Insupport of that proposition, the following authority is cited: *Ex parte Morrill* (C. C.), 35 Fed. 261, 267. * * *.

It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer

> to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search.

In *Lambert* v. *United States* (1922, 9th Cir.), 282 Fed. 413, Federal officers were informed by one Edison that Lambert was selling intoxicating liquor. The officers searched Lambert's automobile and discovered in it a box covered with rags which upon being opened revealed bottles of liquor. The search was held reasonable; and the court, on p. 417, says:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think that the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant.

In *United States* v. *Rembert* (1922, S. D. Tex.), 284 Fed. 996, Federal officers believed that the defendant was drunk while driving his automobile. They searched the car and found liquor. The search was held to be reasonable. The court says on p. 1006:

> Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term "discovery" as used in this act is to be construed in the light of the principles of American and English common law, defining when arrests can be made without a warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officer actually see, before apprehension is made, the liquor the subject of the apprehension.

In *People* v. *Case* (1922), 220 Mich. 379, 190 N. W. 289, an automobile while standing in the road was searched and liquor discovered. The search was held lawful. The court states on p. 386 (N. W. p. 291) as follows:

> Our Constitution contains both a provision against intoxicating liquor and against unreasonable search and seizure. Every constitutional provision as well as statutory should be construed where possible to give effect to every other constitutional provision in the instrument.

And on pp. 388 and 389 (N. W. p. 292) it says:

> The automobile is a swift and powerful vehicle of recent development which has multiplied by quantity production and taken possession of our highways in battalions until the slower animal-drawn vehicles with their easy noted individuality are rare. * * * While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfully utilized to facilitate the commission of crime of all degrees, from those against morality, chastity, and decency to robbery, rape, burglary, and murder is a matter of common knowledge. Upon that problem a condition and not a theory confronts administration of our criminal laws.

Other cases holding similar searches in similar cases reasonable are the following:

United States v. *Snyder* (1922, N. D. W. Va.), 278 Fed. 650.

Bell v. *United States* (1922, 5th), 285 Fed. 145.

United States v. *Hilsinger* (1922, S. D. of Ohio), 284 Fed. 585.

State v. *Mullen* (1922), 63 Mont. 50; 207 Pac. 634.

People v. *De Cesare* (1922), 220 Mich. 417; 190 N. W. 302.

See also:

McBride v. *United States* (1922, 5th), 284 Fed. 416.

Kathriner v. *United States* (1921, 9th), 276 Fed. 808.

Herine v. *United States* (1921, 9th), 276 Fed. 806.

Green v. *United States* (1923, 8th), 289 Fed. 236.

State v. *Simmons* (1922), 183 N. C. 684; 110 S. E. 591.

IV.

Assuming that search was unlawful as to defendant Carroll, it was not as to defendant Kiro.

Assuming that the search was unlawful as to the defendant Carroll it was not unlawful as to the defendant Kiro. It is not denied that both defendants were engaged in transporting liquor. Both Carroll and Kiro in their petitions to return the liquor and the automobile which was seized state that the liquor and automobile belonged to Carroll only. (R. 3–5.) The search, therefore, if unlawful as to Carroll violated no constitutional rights of Kiro. *Wilson* v. *United States* (1910), 221 U. S. 361; *Dreier* v. *United States* (1910), 221 U. S. 394; *Haywood* v. *United States* (1920), 268 Fed. 795.

In the *Haywood* case search and seizure was made of the offices of the I. W. W. The property seized was offered in evidence against a member of the

association and was held to have been properly admitted. The court, on p. 803, says:

> Consider, next, the person whose privacy is invaded. If it be granted that the home of Burglar Smith, in which he has concealed the stolen goods and the implements of his crime, can not lawfully be searched and the property seized, except under a warrant, * * *, it does not follow that Burglar Smith will be heard to complain that the Fourth Amendment has been violated by forcible and unlawful breaking into the home of Burglar Jones and the seizure there of the property and implements of crime of Burglar Smith.

The Fourth Amendment provides that:

> The right of the people to be secure in *their* persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *.

Kiro's security in *his* effects was not violated.

V.

No error in admitting in evidence conversation between defendants and Government agents prior to arrest.

The objection that the admission of the testimony concerning the conversation between the defendants and the Government agents on September 29, 1921, constituted error is groundless. That evidence was offered to show one of the grounds which made the search and arrest of the defendants reasonable. An objection that evidence is incompetent (R. 8) without

stating specific reasons for objection is equal to no objection at all. *See Sparf* v. *United States* (1894), 156 U. S. 51, 57. Also, if the admission of said testimony was error, it was harmless error, because defendants failed to object to the same matter being testified to by another Government witness. (R. 11.)

CONCLUSION.

The existing concurrent conditions above discussed made the search in question reasonable, and therefore lawful. Also by an application of the law of arrest the search was proper. No property of the defendant Kiro was searched or seized and he can not claim a constitutional violation as to him. Defendants' objection to the admission of the conversation between them and the Government agents had no merit, nor was it properly made.

The defendants had a fair trial; no errors were committed by the court which affected prejudicially their substantial rights or constitutional privileges, and the judgment of the lower court should therefore be affirmed.

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Assistant Attorney General.
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NOVEMBER, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GEORGE CARROLL AND JOHN KIRO, plaintiffs in error, v. THE UNITED STATES. } No. 117.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

SUBSTITUTED BRIEF FOR THE UNITED STATES ON REARGUMENT.

STATEMENT.

The case comes direct to this court upon a writ of error to the District Court of the United States for the Western District of Michigan, under Section 238 of the Judicial Code. It involves the construction and application of the Fourth and Fifth Amendments to the Constitution.

The plaintiffs in error, George Carroll and John Kiro, whom we shall refer to hereafter as the defendants, were tried and convicted of unlawfully transporting intoxicating liquor in violation of the National Prohibition Act. (R. 2, 15.) The conviction resulted from the introduction in evidence of certain liquor

taken from an automobile in the possession of the defendants by Federal prohibition officers, who searched it, seized the liquor, and arrested the defendants without any previous warrant either of arrest or of search. Upon the trial of the case the defendants seasonably objected to the introduction of the liquor in evidence and to all testimony of its discovery offered by the officers who made the search. The defendants offered no evidence whatever (R. 14), and the case went to the jury upon that produced by the Government (R. 14). The charge of the court was not open to exception, save upon the same ground urged in the defendants' petitions for the return of the liquor and their objection to its use at the trial. (R. 14–15.) A summary of the evidence is contained in the bill of exceptions (R. 7) from which the following facts and circumstances appear:

Fred. Cronenwett was Chief in Charge of the Federal Prohibition Department in the district about Grand Rapids, Michigan (R. 11). Arthur Scully and Mr. Thayer were Federal Prohibition agents working under him. (R. 7.) Walter Petersen was Drug and Liquor Inspector of the State Department of Public Safety of the State of Michigan. (R. 10.) On September 29, 1921, Cronenwett and Scully were in the latter's apartment at 122 Oakes Street, Grand Rapids, Michigan. George Carroll, John Kiro and one Kruska came to that address in the Oldsmobile roadster which was subsequently searched. (R. 8, 11.) Cronenwett was introduced to the visitors under the name of Stafford, told them he was em-

ployed by the Michigan Chair Company, and desired to obtain three cases of whiskey. A price was agreed upon and the defendants promised to deliver the liquor within a half or three-quarters of an hour. They stated that it was in the eastern end of Grand Rapids and they would have to go there to get it. Later they returned, and Kruska came up to the apartment and stated that they were unable to get the liquor that night because a man by the name of Irving from whom they expected to obtain it was not in, but that it would be delivered the following day at ten o'clock. The liquor was not delivered on that day. (R. 8, 11.) About a week later, on October 6, 1921, Cronenwett and Scully were patrolling the highway leading from Grand Rapids to Detroit. While Scully was away eating lunch the two defendants passed Cronenwett in the same Oldsmobile roadster which they had been driving the week before. Scully returned about twenty minutes after they had passed. Thereupon Cronenwett and Scully drove after them for the purpose of observing their movements. They followed them as far as East Lansing, where they "lost trace of them" and "gave up the chase." (R. 8, 11–12.)

Two months later, on December 15, 1921, Cronenwett, Scully, Thayer, and Petersen were patrolling the highway between Detroit and Grand Rapids looking for violators of the Prohibition law. They were driving eastwardly in the direction of Detroit and while upon the highway between Lowell and Saranac the defendants, going westwardly towards

Grand Rapids, passed them in the Oldsmobile roadster already referred to. The defendant Kiro was driving and defendant Carroll was riding in the seat beside him. (R. 7, 12.) Cronenwett and Scully immediately recognized both the defendants and the automobile, and after having passed it some distance they turned about, followed the defendants, overtook them, and obliged them to stop. Cronenwett asked them to get out of the car, which they did. He then raised the back part of the roadster and raised the cushion of the seat, finding no liquor in either place. He then struck the back cushion and found that it was very hard, much harder than the upholstery of an automobile seat ordinarily is. It was practically solid. (R. 13.) Thereupon the upholstery was removed, disclosing 68 bottles of liquid which, upon subsequent examination and analysis, proved to be whiskey and gin. Petersen then brought the liquor and the defendants to the office of the United States Marshal at Grand Rapids, the other men remaining upon the highway to search for other violators of the Prohibition Law. (R. 7, 12.)

At the time of the search and seizure the Prohibition officers had neither a warrant of arrest nor a search warrant, and had no other grounds than those above stated for suspicion that these defendants were transporting liquor along the highway on that day. (R. 8.)

From the facts stated it thus appears:

(1) That the officers who made the arrest and search were Federal prohibition officers charged with

the duty of enforcing the National Prohibition Act (Act of October 28, 1919, 41 Stat. 305, c. 85, Title II, Secs. 2, 25, 26); (2) that these officers were engaged in the performance of that duty; (3) that they had fair grounds for suspecting that the defendants were bootleggers; (4) that they knew the automobile which the defendants used in that business; (5) that they knew that the highway between Detroit and Grand Rapids was habitually used by violators of the National Prohibition Act to transport liquor; and (6) that the defendants, at the time of the arrest and search, were traveling in that automobile from the direction of Canada, a known source of supply, towards Grand Rapids, their known market.

The ultimate question here involved is whether the arrest of the defendants and the search of their automobile under these circumstances was lawful.

ASSIGNMENT OF ERRORS.

Six errors have been assigned. (R. 16.) The first five raise the same question and are in substance as follows:

> That the search made by the Federal Prohibition Agents was unlawful, and the liquor seized was used in evidence in violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The sixth error is as follows:

> That the trial court erred in admitting in evidence, over respondents' objection, certain

testimony of Arthur Scully, as to conversation alleged to have taken place with Mr. Cronenwett and respondents in September, 1921.

The legality of the arrest, as distinguished from the search, was not raised in the court below, nor is it assigned as error in this Court; and the law of arrest will be treated herein only so far as is necessary because of its close analogy to the law of search.

A lawful search and seizure by a Federal officer is one which is authorized by statute and permitted by the Constitution. Our first inquiry therefore relates to the statute; our second, to its constitutional validity; and we shall endeavor to show to the Court that—

I. The search was authorized by the National Prohibition Act, and

II. The search was permitted by the Constitution.

ARGUMENT.

I.

The search was authorized by the National Prohibition Act.

Section 26 authorizes an officer of the law to search a vehicle in which intoxicating liquor is being transported contrary to law, either with or without a warrant.

[All sections referred to are contained in Title II of the National Prohibition Act, 41 Stat. 305, 307, c. 85.]

The unlawful transportation of liquor is forbidden by Section 3 of the National Prohibition Act, and by Section 29 the first offense is made a misdemeanor

punishable by a fine not in excess of $500.00. The powers and duties imposed upon officers engaged in the enforcement of the law, so far as they are relevant to this case, are contained in Sections 2, 25, and 26, which are here printed in full for the convenience of the Court:

> SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said Section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217 et seq.).
>
> SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in

violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found

therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous

> receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

That Section which not only empowers but directs enforcement officers to search and to seize without warrant, where the circumstances require it, is Section 26, the true purpose and intent of which may be found only by an examination of the related sections.

Section 2 designates the officers charged with the enforcement of the Act, those authorized to swear out and to serve *warrants of arrest*, and those authorized to issue such warrants. By reference to Section 1014, Revised Statutes, it also designates the officers authorized to issue *search warrants*.

Section 25 renders unlawful the possession of any liquor, or property designed for the manufacture of liquor, and destroys all property rights in and to it.

It then provides that in cases where search warrants are to be issued the procedure for their issue, service, and return shall be that provided by Title XI of the Espionage Act of June 15, 1917 (40 Stat. 217, 228). Reference to that title discloses that it is a comprehensive statute with a score of separate sections, setting out with great particularity the procedure to be followed. In the instant case we need refer to it no further than to observe that the National Prohibition Act adopts *only* its procedure; and the provision contained in its second section, which limits the issuance of search warrants to property used in committing a felony, does not limit Section 25 of the Prohibition Act to cases of felony. (See *United States* v. *Friedman*, 267 Fed. 856; *United States* v. *Metzger*, 270 Fed. 291.)

The provisions of Section 25 relate primarily to the search of fixed property as distinguished from automobiles and other vehicles. It deals with the "private dwelling," the traditional Englishman's "castle," with particular care and solicitude, defining specifically the term "private dwelling" and limiting the right of search to cases of unlawful *sale*, thus excluding *manufacture*. A further provision for the protection of dwelling houses is contained in the supplemental act of November 23, 1921, 42 Stat. 222, c. 134, Sec. 6, to which we shall refer hereafter.

Having made these provisions, Congress next turned its attention to the matter of transportation, which obviously presented a different and more difficult problem. It is significant that this problem is

dealt with in a separate section. Congress recognized the tremendous obstacles which officers of the law would encounter in their efforts to detect and punish this form of crime.

The language used is also significant. The duty imposed upon the officer is direct and peremptory—"*It shall be his duty to seize* any and all intoxicating liquors *found* therein being transported contrary to law." It contemplates a *finding* and directs a seizure, but it does not direct the officer first to apply for or obtain a search warrant. Intoxicating liquors which are "being transported" must necessarily be in containers, bottles, barrels, or casks, which of themselves would prevent any officer from knowing positively the nature of their contents until he had made a more careful examination than can be made by the eye. And in the case of illegal transportation, of course the liquor would be further concealed from examination by covering or hiding the containers.

He is directed to seize only in case of liquor which is "being transported contrary to law," which necessarily requires that whenever he has knowledge that liquors are being transported he shall be empowered to determine whether the transportation is lawful or unlawful, and to this end that he shall demand of the person transporting, evidence of his permit.

Again, he shall seize whenever he shall "*discover* any person *in the act* of transporting." Much refinement has been indulged in by the courts which have considered the meaning of the word "discover" as used in this section. In an opinion of unusual ability

delivered in the Court of Quarter Sessions of Philadelphia, in *Commonwealth* v. *Street and Street*, 3 Pa. District & County Reports 783 (advance sheets of December 18, 1923), Judges Stern and Gordon, considering the meaning of the word as used in the Pennsylvania and the Federal statutes, said (at p. 786) (see Appendix B of this brief, post, p. 83 ff):

> It will thus be seen that the Pennsylvania statute expressly gives the right to an officer to make a seizure "with or without a warrant" if he shall "discover" the person in the act of transporting intoxicating liquor. The word "discover," which also appears in the Federal act, has been made the subject of extended discussion respecting its connotation as thus employed in this legislation. Some courts have taken the ground that by "discover" is meant that the officer without any preliminary manual action must actually see, hear, or smell the liquor. This has resulted in a fineness of interpretation which makes the subject amusing. A bottle of liquor may be so inclosed as to make visual evidence of its existence impossible, and thus an officer would be denied the right of further examination in order to enforce the law and apprehend the lawbreaker. It is argued that if the liquor be so concealed in the passing automobile as to render it invisible, the officer is powerless to act, whereas if the cork of a bottle protrudes, or if a blanket be so carelessly placed over the contents of the vehicle as to allow a peep at the articles which it is intended to conceal, the officer is thereby afforded such

reasonable and probable cause as to justify his further action. It is not believed that the practical and common sense nature of our people and of the law which that nature has through so many centuries developed will permit of such academic and finespun distinctions. As a matter of fact, the word "discover" has no such limited meaning. As defined in Webster's International Dictionary, it means to "uncover; to remove or lift (any covering); to lay open to view; to reveal; to make known; to show (what has been secret, unseen or unknown); to manifest; to show; exhibit; betray; to explore; examine; reconnoiter; to obtain for the first time sight or knowledge of, as of a thing existing already, but not perceived or known; to find out; to ascertain; espy; detect; descry." In other words, the essential nature of the word "discover" involves, not a facile observation, but rather a detection as the result of preliminary measures by way of uncovering, revealing, and laying open to view. The very etymological analysis of the word would suggest an uncovering rather than a mere observation of something already exposed to the action of the senses.

We readily conclude, therefore, that both the Federal and state acts do not intend by the use of the word "discover" to limit the right of the officer to proceed only upon the evidence of the optic, auditory, or olfactory nerves, but, on the contrary, were intended to and do give such right when a "discovery" is made as the result of an "uncovering,"

> "revealing," or "exploring." Furthermore, the state act expressly provides (section 8) that "the right to a search warrant, as provided for in this section, shall be in addition to all other rights of search and seizure now existing under law," and at common law officers have had the right from time immemorial to conduct reasonable searches and seizures without warrant.

In *United States* v. *Rembert* (1922 S. D. Tex.), 284 Fed. 996, 1006, the court said:

> Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term "discovery," as used in this act is to be construed in the light of the principles of American and English common law, defining when arrests can be made without warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officer actually see, before apprehension is made, the liquor the subject of the apprehension.

The act clearly contemplates that when there is probable cause for believing that liquor is being unlawfully transported, whether that knowledge be gained from trustworthy information imparted by

others, from a knowledge of facts which point clearly to the commission of the offense, or from the actual use of the senses of sight and smell upon the spot, it is their duty to seize the liquor and arrest the offender, even though the circumstances preclude, as they usually do, the possibility of obtaining a warrant. Congress knew, what all know, that to require the use of a warrant under all circumstances, in dealing with the problem of transportation, would have deleted the word "transportation" from the Eighteenth Amendment and from the National Prohibition Act. And if it intended that rum runners carrying their cargo along our highways should be permitted to speed on their way past the officers of the law in perfect security, while the officers went scurrying to the nearest available place to obtain a warrant, it certainly would have protected the officers from the charge of dereliction of duty by stating specifically that the duty imposed upon them by Section 26 should not be performed unless a warrant were first obtained.

The conclusion that officers may arrest and search without warrant under authority of Section 26, is further supported by the action of Congress in enacting Section 6 of the Act of November 23, 1921, 42 Stat. 222, c. 134. That section provides as follows:

> That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in

> the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

At the time this act was passed the National Prohibition Act had been in force for practically two years. The extent of the smuggling of liquors by rum-running automobiles was well known and the difficulties of suppressing the evil were fully appreciated. Congress had its attention specifically directed to the whole question of search and seizure at the time the Supplemental Prohibition Act was pending when Senator Stanley introduced an amendment to H. R. 7294, which later became the Supplemental Prohibition Act, designed to prohibit all search without a warrant. The introduction of this amendment provoked a long debate and a careful review and consideration of the entire subject of search and seizure by the Sixty-seventh Congress.

The so-called Stanley Amendment was adopted by the Senate when the bill was on its passage, along with numerous other amendments, but when the measure was returned to the House it was referred to the House Judiciary Committee for consideration of the Senate amendments. At that

time Mr. Volstead, who was Chairman of the House Committee on the Judiciary on August 13, 1921, filed Report No. 344 to accompany H. R. 7294, in which it was recommended that the House disagree to Senate Amendment 32, commonly known as the Stanley Amendment. The report of Mr. Volstead contained excerpts from the laws of a number of the States relating to the seizure of vehicles illegally transporting liquor, and pointed out the fact that if the Amendment as passed by the Senate were incorporated in the law, it would defeat prohibition enforcement. The Committee report stated (*Cong. Doc. Serial No. 7921; 67th Cong., 1st sess., House Report No. 344, p. 3*):

> Not only does this amendment prohibit search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum-running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.

The result was that the Senate Amendment, along with a number of others, was disagreed to by

the House and the measure was submitted to a committee of conference. The Conference Committee recommended the language which was subsequently adopted in Section 6 of the Supplemental Prohibition Act which we have quoted above.

Thus Congress expressly refused to invalidate all searches without warrant, because it recognized the necessity of such action in the case of transportation by automobile; and it limited the provisions of the Act of 1921 to dwelling houses in order that the authority to search without warrant contained in Section 26 might continue to be exercised.

Referring to the Act of 1921, the District Court for the Southern District of California, in *United States* v. *Bateman*, 278 Fed. 231, 233, said:

> If Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its convictions, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without probable cause.

Other cases which hold that the statute confers authority upon the officers to search without a warrant are:

> *United States* v. *Crossen*, 264 Fed. 459, 462.
> *United States* v. *Daison*, 288 Fed. 199, 202.
> *Lambert* v. *United States*, 282 Fed. 413, 417.
> *United States* v. *Rembert*, 284 Fed. 996, 1006.

The conclusion that the search in the instant case was authorized by statute, brings us to the second and more important question of its constitutional validity.

II

The search and seizure without warrant was permitted by the Constitution.

The plaintiffs in error invoke the guaranties of the Fourth and Fifth Amendments to the Constitution of the United States. These great bulwarks of personal liberty were designed to protect three rights which Englishmen have always cherished: Security of the person against unwarranted arrest, security of property against the unwarranted invasion of public officers, and immunity from self-incrimination. The particular question presented in this case comes for the first time to the bar of this Court, though it has been frequently met in recent years by officers charged with the enforcement of many State and Federal laws and has been frequently considered by the lower Federal courts and those of the States. The fact that this case had its origin in the Eighteenth Amendment and the National Prohibition Act is a purely adventitious circumstance, *and the question now to be determined has an importance which reaches far beyond the incidental problem of enforcing the liquor laws.* It has arisen out of the invention, the rapid development, and the general use of automobiles as a means of transportation. Prior to the invention of the automobile, the well-settled rules of the common law and the decisions of this

and the several State courts had established, with comparative certainty, a proper balance between the necessities of public authority, on the one hand, and the demands of personal liberty, on the other. The invention of this remarkable instrument of transport, however, has operated to disturb that balance. Prior to this invention no species of property, real or personal, had taken such form as to require a reconsideration or readjustment of these well-settled rules of law; but the advent of the motor car requires us to consider in this case whether the same rule which applies to a man's dwelling shall also apply to his automobile *when using a public highway*.

The novelty of the question in this Court and its importance in suppressing crime and indeed in ending the unprecedented "crime wave" seem to justify a rather careful review and examination of the law. The constitutional provisions involved are as follows:

FOURTH AMENDMENT.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT.

> No person * * * shall be compelled in any criminal case to be a witness against himself. * * *

It will be observed that the Fourth Amendment contains two separate and distinct provisions: (1) It prohibits, generally, *unreasonable* searches and seizures.

This was designed to prevent all searches and seizures, whether with or without a warrant, if, under the circumstances, they be found to be "unreasonable."

(2) It prohibits the issuance of warrants of arrest or of search except upon probable cause shown, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

This was designed to prevent forever the use of general warrants, which had become so obnoxious by their use in England to suppress seditious libels, and by their use in this country in the colony of Massachusetts Bay to assist in the enforcement of the revenue laws. The former were attacked in the famous cases of *John Wilkes, Esq.*, v. *Robert Wood, Esq.*, 19 Howell's State Trials, 1154 (1763); *Dryden Leach* v. *John Money, James Watson and Robert Blackmore, Three of the King's Messengers*, Id. 1002 (1765); and *John Entick* v. *Nathan Carrington and Three Other Messengers in Ordinary to the King*, Id. 1030 (1765), and held by the Court of King's Bench to be illegal. The famous judgment of Lord Camden in the last cited case has been justly recognized as a landmark in the history of civil liberty. The offensive Writs of Assistance were attacked in the Superior Court of Judicature of

the Province of Massachusetts Bay in *Paxton's case* (Quincy's Massachusetts Repts., 51,–1761). It was here, as John Adams later declared, that "the child Independence was born" of the impassioned oratory of James Otis, Jr., who, resigning his office as Solicitor General and declining to accept compensation, appeared before the Court and opposed the issuance of the writs in an eloquent address lasting five hours. The history of these celebrated cases has been so fully and ably narrated in the opinion of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, and in the brief filed by counsel for Felix Gouled in *Gouled* v. *United States*, 255 U. S. 298 (among whom was former Justice Charles E. Hughes), that it need not be here repeated. It is sufficient to note that the Fourth Amendment, so strongly relied upon by the defendants in the instant case, found its origin in these great cases.

In the recent case of *People* v. *Case*, 220 Mich. 379, 387, the Supreme Court of Michigan, referring to the constitutional provisions of that State, which are substantially identical with those in the Federal Constitution, said, in contrasting the two provisions contained in the Amendment:

> Each is clear, independent and complete by itself. The first recognizes search and seizure regardless of process, but restricted by a comprehensive, master adjective compelling in performance exercise of moderation and good judgment to exclusion of prejudice, temper and passion. The second deals with warrants

> where time and circumstances permit or in reason require them, specifying restrictive essentials which protect the officer serving them, if fair on their face, even though ultimately shown unfounded and unreasonable, * * *

In the case at bar we are concerned primarily with the first clause of the Amendment. It is admitted that no warrant was issued.

The Term "Unreasonable."

One can not read this first clause without being impressed with the use of the term "unreasonable." If the framers of the Constitution had intended to fasten upon the Congress throughout succeeding generations the rules of law respecting arrest and search which then prevailed, a few words would have sufficed for the purpose. In this, as in so many other clauses of that document, however, they deliberately chose a general term which might, with the progress of society, be adapted to the necessities arising from constantly changing conditions. The term "unreasonable," like that of "excessive bail," "excessive fines," "freedom of speech," "cruel and unusual punishment," and "due process of law," is one which must find its exact connotation in the light of social, political, and economic conditions as they change and develop from one generation to another.

It is obviously impracticable to define "unreasonable searches and seizures." What is reasonable or unreasonable is a judicial question which must be

determined in each case upon the particular facts presented. *Mason* v. *Rollins*, 2 Biss. (U. S.) 99, 102; *Gouled* v. *United States*, 255 U. S. 298; *Agnello* v. *United States*, 290 Fed. 671, 676 Certiorari to U. S. Sup. Ct. granted, Apr. 30, 1923, 262 U. S. 738; *Lambert* v. *United States*, 282 Fed. 413, 417.

We do discover, however, certain definite criteria by which reasonableness may be judged. *And first we must observe that the presence or absence of a warrant, per se, is not such a criterion.*

In *Gouled* v. *United States*, 255 U. S. 298, 301, the Court said:

> Every search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment. It is the right and duty of the Government to secure evidence of crime, even from the accused himself, if this can be done without violating his constitutional rights.

In *Green* v. *United States*, 289 Fed. 236, 238, the Court said:

> It is settled that this amendment contains no prohibition against arrest, search, or seizure without a warrant, but only denounces unreasonable searches and seizures.

It must be conceded that at the time of the adoption of this Amendment the common law recognized the right both of arrest and search without warrant in proper cases. The Amendment was not designed to declare them unreasonable. Such a prohibition would have completely abrogated the salutary prin-

ciples of the common law and proven fatal to the safety and welfare of the public. Similar provisions are embodied in the Constitutions of all of the States, but under them the power and authority of officers to arrest, search, and seize without warrant, in proper cases, is uniformly recognized.

> It is nowhere said that there shall be no arrests without warrant. To have said so would have endangered the safety of society. (*Wakely* v. *Hart*, 6 Binney (Pa.), 316, 318.)

> It [constitution] has never been supposed to prohibit arrests by private persons, or without warrant, in that class of cases where delay would be perilous. Necessity is the first law of government as well as of nature, and is not to be abrogated by implication. (*In re Powers*, 25 Vt. 261, 266.)

Search *with a warrant* may yet be unreasonable, either because the warrant is illegally issued or because the search in some particular exceeds the limits of the warrant. In the cases of *Wilkes* v. *Wood* and *Entick* v. *Carrington*, already cited, warrants had been issued, yet the searches made thereunder were declared illegal, and under our Constitution would be deemed unreasonable. On the other hand, a search *without a warrant* may yet be reasonable, because made in a proper case and executed in a lawful manner.

The presence or absence of a warrant, therefore, is not *per se* a criterion by which to determine the reasonableness of an arrest, search or seizure. The fol-

lowing are the principal criteria, and they are found to apply whether there be warrant or no warrant:

(1) *Does the statute authorize it?* The Amendment "while regulating the issuance of such warrants, does not grant the power to issue them. Consequently no court or judge has inherent power to grant such a writ, but it must be authorized by statute." (Black on Constitutional Law, 2d Ed., sec. 217, page 504.)

(2) *Is it employed to enforce the criminal law?* A search warrant is distinctively criminal process. It can not be lawfully issued in any civil case. *A fortiori*, a search without a warrant can not be made in any civil case. A search made with or without a warrant in aid of any party in a civil action would unquestionably be unreasonable and unconstitutional. In the case of *Robinson* v. *Richardson* (13 Gray (Mass.), 454,457), the Court said:

> All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of penal laws, must be held to be unreasonable, and consequently under our Constitution unwarrantable, illegal and void.

(3) *Is the search made solely for the purpose of securing evidence?* The immunity from self-incrimination, safeguarded by the Fifth Amendment, was well established in the common law long prior to the

famous decision of Lord Camden in *Entick* v. *Carrington, supra*. This immunity operated under the common law and now operates under our Constitution to render unreasonable any search which is purely exploratory, save only that which may be made immediately after an arrest. It operates also to put certain classes of property completely beyond the pale of a search, whether the officer be armed with a warrant or not. The search for property, letters, or papers, which are not part of the *corpus delicti*, nor means or instruments of crime, but which are valuable to the Government only as evidence, is completely beyond its reach. A search for such property and a seizure thereof without warrant is unreasonable, and it is beyond the power of the legislature to authorize a warrant for such purpose.

(4) *Is the search a general or special one?* The promiscuous search by officers of the law directed against no particular person and not in search of any particular thing is unreasonable. The express prohibition against the issuance of general warrants manifestly stamps with the sign of unreasonableness any general search made without a warrant.

(5) *Is there probable cause?* Probable cause is a condition precedent to every reasonable search, either with or without a warrant. The Constitution expressly requires it in advance of a warrant, and obviously it must exist to justify a search without a warrant.

These are the principal standards by which the reasonableness of a search is to be determined. The enumeration is not complete, however, for peculiar circumstances may exist in particular cases which will materially affect the question. Thus, for example, at common law a search ordinarily must be made in the daytime. But those criteria which we have mentioned, and which we shall discuss more in detail in the later portions of this brief, include those which are particularly applicable to the instant case.

Arrest and Search at Common Law.

Before proceeding with the particular facts of the case at bar, it must be observed that little assistance can be gained in the determination of this case by reference to the particular rules of the common law relating to arrest and search. Counsel for the defendants in their brief (at page 9) assert that at common law an arrest without warrant could be made in but two cases: (1) Where a felony is committed or attempted in the presence of an officer, or where he has reasonable grounds to suspect that one has committed a felony; and (2) where a misdemeanor is committed in his presence and the offense amounts to a breach of the peace. There is considerable conflict in the authorities as to whether the rule last stated is correct. Many of them insist that the right at common law to arrest without warrant extended to all misdemeanors committed in the presence of an officer. (*United States* v. *Snyder*, 278 Fed. 650, 653, and authorities there cited; Wharton on Criminal Procedure, Tenth Ed., Vol. I, section

35, p. 74.) If the rule be as stated, it is certain that there were notable exceptions to it, for in *Hawkins, Pleas of the Crown*, Vol. 2, Chap. 12, Section 20, we read:

> Yet it is holden by some, That any private person may lawfully arrest a suspicious night walker, and detain *him* till he make it appear, that he is a person of good reputation. Also it hath been adjudged, That anyone may apprehend a common, notorious cheat, going about the country with false dice, and being *actually caught playing with them*, in order to have him before a justice of the peace: For the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate, would often give them an opportunity of escaping. And from the reason of this case it seems to follow, That the arrest of any other offenders by private persons, for offenses in like manner scandalous and prejudicial to the public, may be justified.

Whatever may have been the rule of common law, however, it is well settled that the legislature has power to authorize arrest without warrant in proper cases. This power has been exercised in numerous familiar instances, such as carrying concealed deadly weapons (*Ballard* v. *State*, 43 Ohio State, 340), gambling (*Shovlin* v. *Commonwealth*, 106 Pa. 369), intoxication (*State* v. *Freeman*, 86 N. C. 683; *Commonwealth* v. *Cheney*, 141 Mass. 102), and many

other offenses, notable among which may be mentioned violations of traffic laws by automobilists and infractions of other municipal ordinances. No one would question the authority of the motor-cycle officer to stop and arrest a driver who exceeds the speed limit, nor even to stop anyone, whether violating the law or not, to ascertain whether the machine is being driven by one duly licensed to operate it. Nor would anyone question the power or the authority of an officer to arrest one whom he sees spitting on the street in violation of a municipal ordinance. In these and innumerable other instances the authority of the officer to make an arrest immediately for an offense committed in his presence is uniformly recognized.

If the rules of the common law had never been extended by statutory enactment to meet the requirements of modern conditions, police regulation to-day would be hopelessly inadequate and ineffective; and, on the other hand, if some of the things which the rules of the common law permitted were enforced to-day we would regard them as grossly unreasonable. As a single instance, we may cite the grounds upon which the common law recognized the right of private persons to arrest offenders upon suspicion. In *2 Hawkins, Pleas of the Crown*, Chap. 12, we read:

> Sect. 8. As to the first particular, viz: What are sufficient causes of suspicion, I shall take notice of some of the principal of them, which are generally agreed to justify the arrest of an innocent person for felony.

> Sect. 9. First, The common fame of the country. But it seems, That it ought to appear upon evidence, in an action brought for such an arrest that such fame had some probable ground.
>
> Sect. 10. Secondly, The living a vagrant, idle and disorderly life, without any visible means to support it.
>
> Sect. 11. Thirdly, The being in company with one known to be an offender, at the time of the offense; or generally at other times keeping company with persons of scandalous reputations, etc.

For a private person, or even an officer, to arrest one to-day upon a charge of felony "upon the common fame of the country" would be challenged instantly.

With respect to the right of search at common law, we may observe that the rules were generally the same as those relating to arrest, owing to the fact that search is exclusively a criminal process. Wherever one might be legally arrested without a warrant for a crime committed in the presence of an officer, his person and property might be searched without warrant to discover and seize the means, instruments, or fruits of his crime, or such things as might be used in its continued or repeated perpetration. *Weeks* v. *United States*, 232 U. S. 383, 392; *Hughes* v. *State*, 145 Tenn. 544, 566; 2 Ruling Case Law, 468.

In *Getchell* v. *Page*, 103 Me. 387, 390, the Court said:

> It is well settled that an officer making an arrest upon a criminal charge may also take

> into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it.

To the same effect are:

> *Holker* v. *Hennessey*, 141 Mo. 527, 540.
> *State* v. *Mausert*, 88 N. J. Law 286.
> *State* v. *Edwards*, 51 West Va. 220, 230.
> *Kneeland* v. *Connally*, 70 Ga. 424.
> *People* v. *Cona*, 180 Mich. 641, 651.
> *State* v. *Hassan*, 149 Iowa, 518, 523.
> *North* v. *People*, 139 Ill. 81, 107.

"The analogy between arresting and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case." (*United States* v. *McBride*, 287 Fed. 214, 218.) In each, the official responsibility of the officer and his own personal observation are considered, in view of the necessity for prompt action, as a sufficient substitute for the judgment of the officer charged with issuing warrant. (*Ex parte Morrill*, 35 Fed. 261, 267; *United States* v. *Snyder*, 278 Fed. 650, 657.)

But the rules of the common law no more exhausted the possibilities of reasonable *search* without warrant than they did those of *arrest* without warrant, and the statutes of both Federal and State governments furnish instances in which this right has been extended to meet new conditions. For the enforce-

ment of the customs laws Congress has provided, by Section 3064, R. S., as follows:

> The Secretary of the Treasury may from time to time prescribe regulations for the search of persons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government, under such regulations.

By Section 3061, R. S., revenue officers are authorized to "stop, search, and examine" any "vehicle, beast, or person," within or without their district, when they shall suspect that there may be concealed upon or within them any dutiable merchandise.

Under this authority and the regulations made by the Secretary of the Treasury, the baggage of every returning American tourist is subject to the most minute and annoying scrutiny, and the examination extends, wherever there is the slightest ground for suspicion, to a like examination of the person. No warrant is required or obtained. The search is recognized as reasonable under the circumstances because obviously necessary.

The several State legislatures have provided for search, with or without warrant, of persons carrying concealed deadly weapons, vagrants, disorderly and intoxicated persons, prostitutes, gamblers, trespassers upon railroad property, or violators of the game and fish laws. No one would question the right of the

game or fish warden to stop one engaged in hunting or fishing, demand that he exhibit his license, and that he display the game or fish which he has caught or killed, and in the event of refusal the right of the officer to proceed and search his hunting jacket or his fishing basket. The police regulations concerning game and fish could be effectively enforced in no other way.

Basis of the Common Law Power and of Its Extension by Statute.

A similar extension of the common law power of arrest and search without warrant may be found in the statutes of England. (*Halsbury's Laws of England*, Volume 9, page 310.)

If it were necessary to bring the instant case squarely within the specific rules of the common law, authorities could be cited which hold that violations of the liquor laws are "breaches of the peace." That being a generic term, includes all violations of public peace or order and includes the unlawful sale, actual or threatened, of intoxicating liquor. (*State* v. *Reichman*, 135 Tenn. 653, 667–669; *Hughes* v. *State*, 145 Tenn. 544, 571–573.) But such construction is not necessary, for the only significance of the specific rules of the common law in their relation to the case at bar lies in the fact that they show clearly that an arrest and search without warrant were not considered *unreasonable* where two circumstances existed:

(1) The offense was committed within the presence or observation of the officer or within his knowledge so that his knowledge and official responsibility might fairly be substituted for the sanction of the oath made by an informer before a magistrate; and

(2) The prompt action of the officer was necessary in order to prevent the escape of the felon or misdemeanant, or the removal of the fruits, or instrumentalities, of his crime.

Where these conditions were present an arrest or search without a warrant was not unreasonable at common law. And so it is that by statute from time to time new cases have been provided for, where arrest or search without warrant has been recognized as reasonable because these circumstances were present.

The instant case is clearly within the reason of the common law rules. The distinctive character of this case lies in the fact that the necessity for prompt action, which is one of the essential conditions, arises not out of the character of the offense, but out of the character of the property to be searched—a factor which has not heretofore created such necessity.

We recognize the fact that reasoning based upon public necessity may be employed to extend the powers of police officers to unreasonable extremes. The fact that it is convenient or desirable in the interest of the public that a right of search without warrant should exist is, of course, not a conclusive argument that it does exist. Nevertheless, it is a consideration which must be given great weight in

determining whether or not the exercise of such a power is reasonable. It is noteworthy that every concession which personal liberty has made to police authority, every so-called invasion of the liberty or privacy of the individual which is now universally recognized under well-settled rules of law has been founded upon public necessity. This was recognized by Lord Camden, who, in rendering his famous judgment in *Entick* v. *Carrington*, 19 How St. Tr. 1030, 1066, said:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good.

Imprisonment, as a punishment for crime, is an abridgment of personal liberty founded upon the theory that it is necessary for the protection of society. Again, although the legal presumption that one is innocent of crime prevails until after an adjudication of his guilt by a court of competent jurisdiction, yet he may be apprehended and imprisoned to await trial, unless, in the case of a bailable offense, he is willing and able to furnish such security for his appearance as the law may require. However inno-

cent he may be, he may be deprived of his liberty upon the oath or affirmation of anyone ready to swear to the necessary facts.

> Even in the freest country there is this painful yet unavoidable contradiction, that while we hold every person innocent until by lawful trial proved to be guilty, we must arrest a person in order to bring him to a penal trial; and, although by the law he is still considered innocent, he must be deprived of personal liberty until his trial can take place, which can not always follow instantly upon the arrest. To mitigate this harshness as much as possible, free nations guarantee the principle of bailing in all cases in which the loss of the bailed sum may be considered as a more serious evil than the possible punishment. (Lieber on Civil Liberty and Self-Government, 3d Ed. p. 67.)

Although the usual condition precedent to an arrest is a warrant duly issued by an authorized judicial officer upon oath or affirmation of witnesses, yet, as we have observed, there are many instances in which arrest may be made without a warrant. The reason is that the public necessity requires it. (*United States* v. *Bateman*, 278 Fed. 231; *Holker* v. *Hennessey*, 141 Mo. 527; *Getchell* v. *Page*, 103 Me. 387.)

The authority of private persons to arrest in certain cases (2 Hawkins, Pleas of the Crown, Chap. 12, Section 20), the right to break down doors to arrest a fleeing felon or to execute criminal process (2 Hawkins, Pleas of the Crown, Chap. 14, Section 1), and

the right to search both with and without warrant (*Robinson* v. *Richardson*, 13 Gray [Mass.], 454, 456), all alike are founded upon the theory of public necessity.

That the right of search without warrant is necessary under modern social conditions in many cases where it might not have been necessary a century ago is therefore both a powerful and a legitimate argument in favor of its reasonableness in such cases.

"Unreasonable Searches" in the Light of the Eighteenth Amendment.

In determining what is a reasonable search in the constitutional sense, due weight must be given to the fact that the Eighteenth Amendment expressly forbids the *transportation* of intoxicating liquor, and also provides that "the Congress * * * shall have power to enforce this article by appropriate legislation." We think it must be conceded that in these days of improved highways and motor transport the only effective legislation which Congress can enact for the enforcement of the specific prohibition against the transportation of liquor is such as will authorize the search of automobiles without warrant when probable cause exists. We do not contend that the Eighteenth Amendment must be enforced in such manner as to set aside the provisions of the Fourth, but we believe that what is reasonable in the constitutional sense must be interpreted in the light of the fact that another constitutional provision of equal weight and importance forbids the transportation of liquor. If the Eight-

eenth Amendment had forbidden only the manufacture and sale of intoxicating liquor, and the prohibition against transportation were contained only in an act of Congress passed for the purpose of carrying such amendment into effect, the question might be a materially different one.

The Circuit Court of Appeals for the Fourth Circuit in an opinion delivered February 8, 1924 (No. 2152) in the case of *Louis Milam* v. *The United States*, not yet reported, said:

> The constitutional expression "unreasonable searches" is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic, and legal conditions. The obligation to enforce the 18th Amendment is no less solemn than that to give effect to the 4th and 5th Amendments. The courts, are, therefore, under the duty of deciding what is an unreasonable search of motor cars in the light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes. Every constitutional or statutory provision must be construed with the purpose of giving effect, if possible, to every other constitutional and statutory provision, and in view of new conditions and circumstances in the progress of the nation and the state. *Downes* vs. *Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; *South Carolina* vs. *United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; *Elrod* vs. *Moss* (4th Circuit) 278 Fed. 123, 129; *An-*

gello vs. *United States* (2nd Circuit) 290 Fed. 671. In view of the difficulties of enforcing the mandate of the 18th Amendment and the statutes passed in pursuance of it, we can not shut our eyes to the fact known to everybody that the traffic in intoxicating liquors is carried on chiefly by professional criminals in motor cars. Robberies and other like crimes are committed, and criminals escape by their use. To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the courts in aid of the traffic outlawed by the Constitution. The argument in favor of stopping and searching without warrant motor cars in the effort to detect robbery and other crimes and to discover stolen goods is also very strong, but with that we are not now concerned. Objections to such searches made by officers with due courtesy and judgment generally come not from citizens interested in the observance of the law, but from criminals who invoke the Constitution as a means of concealment of crime.

In *United States* v. *Bateman*, 278 Fed. 231, 232, the court said:

> This proposition involves the interpretation of the 4th, 5th, and 18th Amendments to the Constitution of the United States. These amendments are of equal force and importance. It is plain that the 18th Amendment can not be enforced without legislation to enforce it, * * *.

In the light of these general principles, the Government contends that the search and seizure without warrant which was made in the case at bar was not unreasonable, because:

1. The defendants were operating an automobile upon a public highway.

2. The property seized was the legitimate object of search and seizure.

3. The defendants were committing a crime in the presence of the officers.

4. There was probable cause.

1.

The defendants were operating an automobile upon a public highway.

(a) The automobile afforded an immediate and effective means for escape, for removal of the object of the search, and for continued perpetration of the crime.

A factor of prime importance in determining the reasonableness of the search of these defendants without a warrant, is the fact that they were engaged at the time in operating an automobile upon a public highway. It is this circumstance which lends to the case at bar a stature which casts its shadow far beyond the boundaries of prohibition enforcement. That this is a liquor case is accidental. The principle which is to be established is fundamental.

> If the right here under investigation does or does not exist with regard to intoxicating liquor, it similarly does or does not exist with regard to narcotic drugs, weapons of crime and other instrumentalities used by the criminal classes in the warfare constantly maintained by them against organized society. The

> right to stop and search an automobile for liquor is no different from the right to stop and search an automobile to see whether or not it contains an infernal machine, opium or a bandit concealed beneath a laprobe, or, indeed, to discover whether or not the operator of the vehicle has in his possession the license card provided by the automobile statutes of the State. The question, therefore, must be removed from the atmosphere of the prohibition acts into one of the general extent of the police power under similar circumstances. (Stern and Gordon, J. J., in *Commonwealth* v. *Street and Street*, 3 Pa. District and County Reports, 783, 788, advance sheets of Dec. 18, 1923.) (Appendix, post p. 87.)

Nor will the consequences of the decision end with its application to the cases just referred to. It is conceivable that the possibilities of rapid transportation have not yet been exhausted and that inventive genius may furnish to succeeding generations engines now unknown which will far surpass in speed the present day motor car. The rule now made must apply with equal force to them. In its last analysis the question is whether all personal property, no matter what its character or form, must nevertheless be shrouded in the same inviolable privacy which has immemorially belonged to an Englishman's house, papers, and personal effects.

The invention, development, and general use of automobiles has probably produced a more profound effect upon social conditions than any other invention

of modern times. It has been productive of great benefits, but it has also presented to the officers charged with the enforcement of criminal laws the most serious challenge which they have ever been called upon to meet. In furnishing to criminals a means of rapid, safe, and private transportation over long distances, in affording swift, silent, and secret means of approach to and retreat from the place of crime, and in affording opportunity for the removal of stolen goods, or other fruits, evidences, or instruments of crime, it has far outdistanced the ingenuity and resources of police officers and seriously menaced the safety of our people in town and country alike.

The character and importance of the new problem which it has presented has been well described by the Supreme Court of Michigan in the recent case of *People* v. *Case*, 220 Mich. 379, 388, where that Court said:

> The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in battalions, until the slower, animal-drawn vehicles, with their easily noted individuality, are rare. Constructed as covered vehicles to standard form in immense quantities, and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious

question far deeper and broader than their use in so-called "bootlegging" or "rum running," which in itself is no small matter. While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfully utilized to facilitate commission of crime of all degrees, from those against morality, chastity and decency, to robbery, rape, burglary, and murder is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws. Whether search of and seizure from an automobile upon a highway or other public place without a search warrant is unreasonable is, in its final analysis, to be determined as a judicial question, in view of all the circumstances under which it is made.

We are not unmindful of the fact that heretofore no distinction has been drawn between various kinds of property which may be the subject of search. A man's clothing upon his person, his house, his papers, his office with its desks and files, and his postal communications sealed against inspection, have all been accorded the same protection, and no search of them has been permitted without a warrant, save that which is allowed immediately subsequent to a valid arrest. But the motor car is essentially different

from all of them in its mobility and in the fact that its ordinary use is entirely upon the public highway. It is *sui generis*. This fact, together with the necessity of vesting police officers with authority sufficient to enable them to engage on even terms the forces of disorder, justify the search of an automobile without a warrant when a search of a stationary or permanent habitation might, under otherwise identical circumstances, be wholly unreasonable.

This is the view which has been taken by those courts which seem to have given to the question the most careful consideration, and others though following a different course of reasoning, agree in the conclusion that automobiles may reasonably be searched without warrant.

> *Commonwealth* v. *Street and Street*, supra.
> *Louis Milam* v. *United States*, C. C. A. 4th Cir. No. 2152, decided Feb. 8, 1924, not yet reported.
> *People* v. *Case*, 220 Mich. 379, 383.
> *People* v. *De Cesare*, 220 Mich. 417.
> *People* v. *Margolis*, 220 Mich. 431.
> *United States* v. *Fenton*, 268 Fed. 221.
> *Commonwealth* v. *Rubin*, Pa. Superior Ct. Reported in Pittsburgh Legal Journal, Dec. 22, 1923, 921, 925.

It is a far cry from the "straw-built hut" which Lord Chatham in addressing Commons so eloquently described as beyond the approach of the King of England, to the modern high-powered motor car.

The case of *Amos* v. *United States*, 255 U. S. 313, relied upon by the defendants, is distinguishable

from the case at bar upon two grounds: (1) The record in that case discloses that the officers had no probable cause for the search, but appeared at the defendant's dwelling house and announced that they "had come to search the premises for violations of the Revenue Law." The search was purely exploratory. (2) The search was of a dwelling house and not an automobile.

The automobile in the instant case furnished an immediate means for escape, for removal of the object of the search, and for continued perpetration of the crime. These circumstances are of precisely the same character as those which at common law justified the arrest of felons or misdemeanants and their search without warrant to discover and seize the fruits, means or instruments of crime.

(b) The operation of an automobile upon a public highway is subject to such restrictions as the reasonable exercise of police power renders necessary.

"The streets belong to the public and are primarily for the use of the public in the ordinary way." (*Packard* v. *Banton*, 126 October Term, 1923, opinion delivered February 18, 1924.) The right of free passage to and fro along the highways was long recognized as in the nature of a natural right. The means of transportation were such that their use involved no danger to the public and occasioned no police regulation.

The right to operate an automobile, however, is quite different. As soon as the motor car appeared upon our highways it was recognized as a dangerous instrumentality, and thereupon the

public asserted its right to declare upon what conditions such machines might use the public streets. Whether the operation of automobiles upon the highways could be absolutely prohibited is perhaps a doubtful question. The Legislature of Prince Edward Island once enacted a statute (8 Edward VII, c. 13) entitled "An Act to Prohibit the Use of Motor Vehicles Upon the Public Highways of this Province," and the power of absolute prohibition there exercised was sustained in *In re William K. Rodgers*, 7 Eastern Law Repr. 212. The power has been doubted in *Walker* v. *Commonwealth*, 40 Pa. Superior Ct. 638, 642, and *Ex parte Snowden*, 12 Cal. App. 521, 526. It is clear, however, that their use upon certain streets or sections of a municipality may be forbidden. (Huddy on Automobiles, 5th Ed., p. 279, sec. 232.)

More common, however, are the statutes requiring that all automobiles be licensed, that they be equipped with horns, lights, and brakes in the manner prescribed by law, that they display license tags as a means of identification, that they be operated only by persons duly licensed who are required to carry upon their person and display upon demand their license to operate, and that they be operated subject to innumerable traffic regulations. The extensive exercise of the police power over this modern form of transportation is a clear recognition of the distinction which exists between the right of a pedestrian, or the driver of a horse, and the operator of a motor vehicle. And as the motor car may only be operated subject to the reasonable police regula-

tions, with which we are familiar, so also it is reasonable to provide by statute that it shall be operated only on the condition that it be subject to inspection and search whenever that is necessary to prevent it from becoming the instrument of criminals.

The very able discussion of this subject in *Commonwealth* v. *Street and Street*, which we have already cited, justifies the following extended quotation from that opinion (Appendix, *post*, p. 91):

> When the Constitution was adopted, the only subjects to which the 4th Amendment could apply were the persons of the individual citizens, their homes and their stores and warehouses. The rights of a person to privacy, to living in his home uninterrupted by official espionage, and to conducting the ordinary mercantile pursuits, were all antecedent in point of time to the organization of the Federal Government and to the formulation of its Constitution and laws. These rights were what the eighteenth century French philosophers would have called "natural rights," and as such they were peculiarly the subject of protection against the despotism of organized society and of its official representatives. Automobiles, viewed from the standpoint of personal property, are in an entirely different position. No one has a right to operate a motor vehicle upon the highways of the Commonwealth or of a municipality without a preliminary license granted by the State. No one needs such a license to live, to inhabit a home, or to transact

most lines of industry. There are, however, certain activities—for example, the sale of liquor in preprohibition days, the conducting of a pawnshop, and the like—which can not be carried on except by special permission, and as to which no one has a natural or inalienable right. The operation of a motor vehicle is in this class. The automobile, an invention of recent origin, is peculiarly the subject of governmental control, and were this not so, modern life and society would be hopelessly imperiled. If, therefore, it be true, as it is true, that a citizen has no right to use or to operate an automobile at all without permission from the Commonwealth, it must follow that one must obtain such permission *cum onere*, that is, subject to such control or limitations as the State may see fit to impose upon its licensees as conditions precedent to its enjoyment. Can any one doubt, for example, that in granting a license the State may constitutionally provide, as in fact it does provide, that every operator of a motor vehicle may be stopped at any time by an officer and made to exhibit his license card, and may even be compelled to write his name in the presence of the officer for the purpose of establishing his identity, or that any vehicle may be stopped by an officer for the purpose of inspecting it as to its equipment and operation and for securing "such other information as may be necessary?" Act of June 14, 1923, sec. 23, P. L. 718.

In short, the court is of opinion that the constitutional provision as to searches and

> seizures is quite distinguishable in its application to individuals, their habitations and business places on the one hand, and to motor vehicles on the other, because the rights in the one case are entirely independent of government, and in the other are derived wholly from the State. And while we are not prepared to say that there are no limitations of the power of the State even under such circumstances, we are of opinion that in construing the constitutional clause as to the unreasonableness of searches and seizures, such construction is properly to be varied when applied to inalienable rights over which the State has no control, and when applied to those industries and kinds of property (including, as above pointed out, automobiles) as to which no rights exist except in so far as the State may see fit to confer them.

We would not be understood as urging that a prohibition enforcement officer or any other officer of the law should be empowered to stop and search automobiles indiscriminately. The limit of our contention is this—that when an officer charged with the enforcement of law meets upon a public highway an automobile operated by an individual whom he has probable cause to believe is guilty of a serious crime, or is actually committing a continuing offense upon the highway and in the presence of the officer, he shall have the right to arrest such person without a warrant, and if there be like probable cause to believe that there is secreted upon his person, or in the automobile, the means or instruments of the crime, he

shall also have the power to search without warrant. If it be held that the Fourth Amendment prevents the investiture of officers with such authority, then this Amendment, originally designed as a bulwark for the protection of personal liberty, has become the shield and defense of criminals.

It may be urged that the authority sought to be exercised by the officers in this case is one of those insidious encroachments upon the right of personal security which the courts should always be alert to repel. The true situation is precisely the reverse. It is not a case where authority seeks to invade personal security, *but on the contrary it is one where the extension of security to a novel form of property threatens to undermine authority.* By claiming for the automobile the same immunity which properly belongs to a private dwelling, the contention of the defendants bids fair to disturb the even balance so long maintained between the opposing forces of liberty and authority and to tip the scales permanently in favor of disorder and lawlessness.

2.

The property seized was the legitimate object of search and seizure.

Property which may be the object of search and seizure by police officers is of two general classes. The first is that in which the public has no legal interest and which is valuable to the state *only* as evidence of crime or of the intent to commit crime. A search for such property is unlawful and unreason-

able under any and all circumstances, either with or without warrant, and it is beyond the power of Congress to legalize it. (*Cooley, Constitutional Limitations*, 7th Ed. 431.) The second is that in which the public is presumed to have a legal interest because it is more than mere evidence of crime, it is the fruit of the crime or the means or instrumentality by which it is committed. It is part of the *corpus delicti*. Such property is the legitimate object of search and seizure. Property of this class includes stolen goods, weapons used in committing assaults, burglar's tools, forged or counterfeit notes, implements of counterfeiting, implements of gambling, excisable articles, game and fish illegally killed or caught, obscene books and pictures, explosives and dangerous chemicals, and intoxicating liquor illegally possessed and the implements for its illicit manufacture. (*Boyd* v. *United States*, 116 U. S. 616, 623, 624.)

The decision in most of the leading cases involving the right of search and seizure has turned upon the nature of the property to be seized.

In *Entick* v. *Carrington*, 19 How. St. Tr. 1030, the object of the search was papers which might tend to prove the authorship of certain issues of The Monitor or British Freeholder, which were said to be libelous. Counsel for Entick pointed out in his argument that this was not a search for the subject of the alleged crime but a search for evidence only. He argued: "It is the publishing of a libel which is the crime, and not having it locked up in a private drawer in a man's

study" (p. 1038). It was urged by counsel for the defendant that copies of the offending publication were no different from stolen goods which had always been recognized as the legitimate object of a search. But Lord Camden, delivering the judgment of the court, sustaining the position of the plaintiff said (p. 1066):

> I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle him to restitution. In the other, the party's own property is seized before and without conviction. * * *

In the cases of *Leach* v. *Money*, 19 How. St. Tr. 1002, and *Wilkes* v. *Wood*, Id. 1154, the object of the search was evidence of the authorship of certain issues of The North Briton, which were said to be libelous, and a like conclusion was reached by the court in those cases.

In *Boyd* v. *United States*, 116 U. S. 616, an action was brought for the forfeiture of 35 cases of plate glass alleged to have been illegally imported. It became important to the Government to offer in evidence an invoice for 29 cases of plate glass previously imported and not the subject of the pending libel. The District Court made an order for the production of the invoice under Section 5 of the Act of June 22, 1874, which authorized the making of orders for the production of any "business book, invoice, or paper belonging to, or under the control of, the defendant

or claimant, [which] will tend to prove any allegation made by the United States." The compulsory production of this evidence was declared by this Court to be in violation of the Fourth and Fifth Amendments. Referring to the distinction between the two classes of property which we have pointed out, Mr. Justice Bradley said (p. 623):

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * (P. 624:) So also the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. *Commonwealth* v. *Dana*, 2 Metc. (Mass.) 329. Many other things of this character might be enumerated.

> * * * In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment.

In *Weeks* v. *United States*, 232 U. S. 383, the defendant was charged with having used the mails to conduct a lottery. Certain local police officers had made a search of his room, in his absence, without his consent and without a warrant, and had obtained certain lottery tickets and statements relating thereto. A short time afterwards on the same day the United States Marshal made a similar search of his property and obtained a number of letters which tended to incriminate him. He objected at the trial to the introduction of all of these papers in evidence, which objection was overruled by the trial court and its action in so doing was assigned as error in this Court. The opinion of Mr. Justice Day dealt almost exclusively with the letters seized by the United States Marshal. These letters, which were not the subject of the offense nor the means or instrumentality by which it was committed, were held to have been taken in violation of his constitutional rights. As to the lottery tickets themselves, the defendant's objection to their use was not well founded, because they had not been obtained through an unlawful search made by any officer of the United States but by local offi-

cers, and under the decisions of this Court were properly admitted. As the lottery tickets were themselves the instruments of the crime for which the defendant was tried, there is no doubt that they were the legitimate object of search and seizure, though the court had no occasion to determine the point.

In *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, a clean sweep was made of the offices of Frederick W. Silverthorne and his father, and all books, papers, and documents found there were delivered to the District Attorney. He selected such as he thought were valuable as evidence against the defendants in their pending criminal trial, made photographic copies of them, and returned the originals to the defendants. Subsequently it was sought to compel the production of the originals as evidence upon the criminal trial. The nature of the papers found does not appear from the opinion of the court, but it is likely from the nature of the search and the property seized that the letters and papers, whose production was demanded, were of an evidentiary character only.

In *Gouled* v. *United States*, 255 U. S. 298, papers which were of an evidentiary character only, were obtained from the defendant's office by stealth and later used in evidence against him upon a criminal trial. The case came to this court upon a certificate from the Circuit Court of Appeals which certified six questions, but did not set out the nature and character of the papers seized. Mr. Justice Clarke, speaking

for this court, based his opinion, however, upon the assumption that they were papers of an evidentiary character only. He said at page 309:

> Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks cases, supra, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a cirminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

The reason for the distinction between these two classes of property arises out of the immunity from self-incrimination guaranteed by the Fifth Amendment. When stolen goods are searched for and seized the primary right of seizure arises from the fact that the goods are stolen. Their use as evidence against the defendant is considered only incidental. In the case of other property, however, which has evidentiary value only and which is seized for the

sole purpose of using it as evidence, the violation of the immunity from self-incrimination is clear and unalloyed. "In this regard the Fourth and Fifth Amendments run almost into each other." (*Boyd* v. *United States*, 116 U. S. 616, 630.)

Papers so seldom constitute the means or instrumentalities for the commission of crime, and therefore so seldom become the legitimate object of search and seizure, that it has been supposed that a peculiar sanctity attaches to them. That this is not the case, however, was clearly pointed out by Mr. Justice Clarke in *Gouled* v. *United States*, 255 U. S. 298, 309, where he said:

> There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, *Langdon* v. *People*, 133 Ill. 382, and lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth* v. *Dana*, 2 Metc. 329, and we can not doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

The distinction between property which is and that which is not the legitimate object of search and seizure is recognized in:

City of Sioux Falls v. *Walser*, 45 S. Dak. 417.
People v. *Bowen*, 198 N. Y. Sup. 306.
United States v. *Welsh*, 247 Fed. 239.
United States v. *McBride*, 287 Fed. 214.
State v. *Pauley*, 192 N. W. (N. D.) 91.
Commonwealth v. *Klein and Goodstein*, 81 Pa. Sup. Ct. 551.
Commonwealth v. *Schwartz*, Pa. Superior Ct., Pittsburgh Legal Journal, advance sheets, Dec. 22, 1923, 927, 931.
State v. *Krinski*, 78 Vt. 162.
State v. *Simmons*, 183 N. C. 684.
State v. *Chuchola*, 120 Atl. (Del.) 212.
Haywood v. *United States*, 268 Fed. 795.

It is quite clear that the *Boyd*, *Weeks*, *Silverthorne*, and *Gouled* cases, so strongly relied upon by the plaintiffs in error in the case at bar, have no application here, because the property here searched for and seized belongs to that class which is clearly the legitimate object of search and seizure.

Section 25 of the National Prohibition Act provides:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.

Section 26 provides for the seizure and forfeiture of any vehicle used for the unlawful transportation of liquor.

Accordingly, both the liquor and the automobile were the proper objects of search and seizure. The moment their illegal possession or transportation began they at once became the property of the United States. The officers searching for and seizing them did not search and seize property of the person in illegal possession but merely took possession of that in which the United States had a legitimate and proper interest. See *O'Connor* v. *United States*, 281 Fed. 396; *United States* v. *Fenton*, 268 Fed. 221; *United States* v. *O'Dowd*, 273 Fed. 600; *United States* v. *Hilsinger*, 284 Fed. 585; *United States* v. *Bateman*, 278 Fed. 231; *United States* v. *Snyder*, 278 Fed. 650; *People* v. *Case*, 220 Mich. 379.

3.

The defendants were engaged in committing a crime in the presence of the officers.

The arrest and search of the defendants without a warrant is further justified by the fact that they were engaged at the time in committing a crime in the presence of the officers. We have already pointed out that such cases constitute an exception to the general rule which requires a previous warrant. The reasons are two-fold: (1) the officer's knowledge and his official responsibility are a substitute for the sanction of the oath or affirmation of other witnesses, and (2) the necessities of the case require it.

It will be urged, however, that the crime can not be deemed to be committed in the presence of the officer unless he has positive knowledge of it by the

use of his senses of sight, hearing, or smell. Authority in support of this contention has been cited in the brief for the Plaintiffs-in-Error. We think this is clearly erroneous. Such knowledge is not required in many cases of him who makes the oath or affirmation upon which a warrant is issued, and there is no logical reason why it should be required of an officer.

In *Ex parte Morrill*, 35 Fed. 261, 267, it is said:

> A crime is committed in the presence of the officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable ground to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye or an ear witness of every fact and circumstance involved in the charge, or necessary to the commission of the crime.

In *United States* v. *Hilsinger*, 284 Fed. 585, 589, it was said:

> The question whether the officer must have direct knowledge of the contents of the package in transit is an interesting one. He never, by looking at the outside of a box, barrel, or bottle, can actually know what is inside of it. He may have good cause to believe from the label or from the looks of it, from reliable information, or from the situation and circumstances, but he never can know what is inside of it, and if there must be a search warrant issued upon direct evidence of the alco-

> holic contents of the vessel, first-handed evidence, it can never be seized, or practically so. A similar question has often arisen with regard to the carrying of concealed weapons, whether the officer must have first-hand knowledge that one has a concealed weapon before he can arrest him for carrying it. It has been held that an officer has a right, upon reasonable and probable cause, upon such information as would lead one having due regard to the rights of others to act, to arrest, and search for carrying concealed weapons. *Ballard* v. *State*, 43 Ohio St. 341.

In *Green* v. *United States*, 289 Fed. 236, 238, the court said:

> It has further been held that it is not an unreasonable search for an officer, charged with the enforcement of the law, to arrest on the public highway a person who, as in the case at bar, previous information gives him reasonable grounds to believe has committed and is committing a felony. Such was the common law at the time the Constitution was adopted, and the Fourth Amendment made no change therein.

And in *United States* v. *McBride*, 287 Fed. 214, 218, the court said:

> It seems to me, if an officer has reason to believe an offense is then being committed, he may search without having a warrant, just as he may arrest without one when the offense has been committed in his presence. If he may search without a warrant, it is

manifest he may also seize the same things that he could if he held the warrant.

The analogy between arresting and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case.

To the same effect are:

United States v. *Fenton*, 268 Fed. 221.
Lambert v. *United States*, 282 Fed. 413.

In short the question whether a crime is being committed in the presence of the officer is essentially one of probable cause, not one of absolute certainty. Wherever the facts within the knowledge of the officer are such as to warrant a reasonable person in concluding that a crime is being committed, then it is being committed in his presence, within legal contemplation, and arrest and search without warrant are not unreasonable. In the case at bar all of the facts from which the officers drew the inference that the defendants were engaged at the time in transportation of liquor, were facts within their own observation and knowledge, and those facts, as we shall show hereafter in discussing "probable cause," were such as to render their action reasonable.

4.

There was probable cause for the search.

Probable cause is a condition precedent to every lawful search. It is not every idle rumor, unreasonable suspicion, or ill-founded belief in a person's guilt which will justify a search of his person or prop-

erty. There must be a concurrence of an actual belief of guilt with reasonable grounds for entertaining such belief. The source may be either personal observation or information obtained from reliable and trustworthy persons, and the reasonable grounds should consist of such facts as would lead a reasonable man to believe that a crime had been committed and that the person to be searched had committed it.

> Probable cause which will justify an arrest is reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense of which he is suspected. (*Green* v. *United States*, 289 Fed. 236, 238; *United States* v. *Snyder*, 278 Fed. 650, 658.)
>
> Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. (*Burt* v. *Smith*, 181 N. Y., 1, 5.)
>
> Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief. (*Runo* v. *Williams*, 162 Cal. 444, 451.)

Probable cause is not actual and positive personal knowledge. If such positive knowledge were required in advance of the issuance of a warrant, or prior to an arrest and search without warrant, few arrests could be made. Probable cause is no more than a fair inference from known facts.

In the case of *State* v. *Mullen*, 63 Montana 50, 58, the Court said:

> It is the contention of counsel for the defendant that from the very nature of the case the sheriff did not know, and could not know, that the demijohn contained intoxicating liquor at the time the articles were seized or until after seizure and an examination of the contents of the container; hence the seizure was unlawful. As we understand this contention, it is that to authorize a seizure under section 9 the officer must have actual, personal knowledge that the acts of the alleged offender constitute a violation of the liquor laws, and, if counsel are correct, then the arrest and seizure provision of section 9 becomes a dead letter; for under practically any conceivable circumstances it would be impossible for the officer to have such knowledge. * * *
>
> The utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue. In other words, if the circumstances are such that the officer could properly secure a warrant of arrest, he may arrest without a warrant if the offense which the circumstances tend to establish was committed in his presence.

Furthermore, probable cause does not depend upon what the actual fact in the case may be. Nor upon whether the person arrested or searched is finally proven guilty or innocent. Accordingly, circumstances which do not amount to probable cause for

a search can not be strengthened by what is actually found, and, conversely, if there be probable cause, it is not removed nor avoided by the fact that nothing is found. (*Mundal* v. *Minneapolis & St. Louis R. R. Co.*, 92 Minn. 26, 30; *Michael* v. *Matson*, 81 Kans. 360.) Although there are authorities in the lower Federal courts which hold that the actual finding of liquor will justify a search without probable cause (*United States* v. *Bateman*, 278 Fed. 231, 235), we do not rely upon them in this case. It is not our contention that this search was rendered reasonable because sixty-eight quarts of liquor were found in the defendants' automobile, but we do rely upon the facts of which the officers had knowledge at the time the search was made.

A case quite similar in its facts is that of *Green* v. *United States*, 289 Fed. 236. There the defendants had for some time been under surveillance as suspected dealers in narcotic drugs. One day they were seen carrying a grip and entering a drug store, which was a notorious rendezvous for peddlers of narcotics, the proprietor of which was then under indictment. They were arrested and a search of their grip was made without a warrant, and it was held that there was probable cause for the search and that the same was not unreasonable.

As summarized in the Statement of Facts at the opening of this brief, they were as follows: The officers knew the business in which the defendants were engaged. They knew that that business was the illegal transportation of intoxicating liquor to Grand

Rapids and its sale in that city. They knew that the defendants used an Oldsmobile roadster in the conduct of that business. They knew that the highway between Detroit and Grand Rapids was habitually used by violators of the National Prohibition Act as a route over which to transport liquor. And they knew that the defendants at the time of the arrest and search were traveling in that automobile from the direction of Canada, a well-known source of supply, toward Grand Rapids, which was the defendants' market. They had previously bargained with these defendants for the purchase of intoxicating liquor, and upon another occasion had followed their automobile along the same highway.

There was no doubt or uncertainty as to the identity of the defendants. Both Cronenwett and Scully had met them personally and had talked with them, knew that they were "bootleggers," had seen their automobile and seen them engaged in its operation, and on the day of the search, when the defendants passed the officers the latter were absolutely certain of their identity. Nor do we think there was any reasonable doubt that the defendants at the time were engaged in plying their trade. Had any reasonably cautious man known the same facts, he would have inferred that these men when they passed the officers on this highway were bringing with them a cargo of contraband liquor. The question may arise as to why the officers did not turn about immediately and follow the defendants if they were certain of their guilt. This is readily explained, however, by the

obvious fact that if the officers had so turned it would probably have given the defendants reason to believe that they were being pursued and they would have put on full speed ahead for the purpose of escape.

We respectfully submit that under all the circumstances the officers had probable cause for making the arrest and search.

III.

The liquor which was seized was properly admitted in evidence.

Under the circumstances of this case the admissibility of the liquor as evidence against the defendants at their trial depends entirely upon whether it was lawfully seized. If, as the Government contends, it was obtained without violation of the constitutional rights of the defendants, it was clearly admissible to prove their guilt; otherwise, under the decisions of this Court it was inadmissible.

Boyd v. *United States*, 116 U. S. 616.
Weeks v. *United States*, 232 U. S. 383.
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385.
Gouled v. *United States*, 255 U. S. 298.

IV.

Assuming that the search was unlawful as to defendant Carroll, it was not as to defendant Kiro.

Assuming that the search was unlawful as to the defendant Carroll it was not unlawful as to the defendant Kiro. It is not denied that both defend-

ants were engaged in transporting liquor. Both Carroll and Kiro in their petitions to return the liquor and the automobile which was seized state that the liquor and automobile belonged to Carroll only. (R. 3–5.) The search, therefore, if unlawful as to Carroll violated no constitutional rights of Kiro. *Wilson* v. *United States* (1910), 221 U. S. 361; *Dreier* v. *United States* (1910), 221 U. S. 394; *Haywood* v. *United States* (1920), 268 Fed. 795.

In the *Haywood* case search and seizure was made of the offices of the I. W. W. The property seized was offered in evidence against a member of the association and was held to have been properly admitted. The court, on p. 803, says:

> Consider, next, the person whose privacy is invaded. If it be granted that the home of Burglar Smith, in which he has concealed the stolen goods and the implements of his crime, can not lawfully be searched and the property seized, except under a warrant, * * *, it does not follow that Burglar Smith will be heard to complain that the Fourth Amendment has been violated by forcible and unlawful breaking into the home of Burglar Jones and the seizure there of the property and implements of crime of Burglar Smith.

The Fourth Amendment provides that:

> The right of the people to be secure in *their* persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *. [Italics ours.]

Kiro's security in *his* effects was not violated.

V.

There was no error in admitting in evidence conversation between defendants and Government agents prior to arrest.

The objection that the admission of the testimony concerning the conversation between the defendants and the Government agents on September 29, 1921, constituted error is groundless. That evidence was offered to show one of the grounds which made the search and arrest of the defendants reasonable. An objection that evidence is incompetent (R. 8) without stating specific reasons for objection is equal to no objection at all. See *Sparf* v. *United States* (1894), 156 U. S. 51, 57. Also, if the admission of said testimony was error, it was harmless error, because defendants failed to object to the same matter being testified to by another Government witness. (R. 11.)

Summarizing the contentions of the Government we respectfully submit:

1. That the search which was made of the defendants' automobile without a warrant was authorized by the provisions of section 26 of the National Prohibition Act.

2. That the search and seizure without a warrant was not unreasonable nor in violation of the constitutional rights of the defendants because—

(*a*) They were engaged at the time in operating an automobile upon a public highway. The automobile afforded an immediate and effective means for escape, for removal of the object of the search,

and for continued perpetration of the crime in which they were engaged.

(*b*) The property searched for and seized was the legitimate object of a reasonable search and seizure.

(*c*) They were engaged at the time of the search in committing a crime in the presence of the officers, and

(*d*) The facts and circumstances known to the officers furnished probable cause for the belief which the officers entertained that intoxicating liquor was being unlawfully transported by the defendants.

We respectfully submit that with the advent of the motor car, property has taken a form which has created a necessity for search and seizure without warrant which has not heretofore existed. Notwithstanding the fact that no distinction has heretofore been made between the subjects of search, whether houses, papers, or other possessions, this new form of property requires that a distinction be made. If there be probable cause, and the object of the search be a legitimate one, the search without warrant of an automobile which is being operated upon a public highway is a reasonable and lawful search, even though that of a house, hotel, apartment, office, or other fixed property might under similar circumstances be unreasonable and unlawful.

CONCLUSION.

The reasonableness of a search depends upon whether the public interest at the time is such as to justify the invasion of the citizen's privacy for the public good. The privacy of every citizen is necessarily

subject in this as in all respects to such contribution to the public safety as the common weal demands. If, having regard to the public necessities, the sacrifice of privacy which the citizen is called upon to make is disproportionate to the public good to be served, then it is "unreasonable." If, however, such sacrifice is reasonably necessary to the safety of the state, it is reasonable. Upon this theory the examination of an incoming passenger's baggage and even the humiliating search of his clothes and person is at times justified, for without it there could be no reasonable administration of the customs laws. We concede that in thus determining what is reasonable, doubts should be resolved in favor of the citizen. But such consideration should not be carried to the indefensible extent of imperiling the safety of the State, as the unchecked increase of crime does certainly threaten.

In determining at any given time or with reference to any given subject what is reasonable, having fair regard both to the safety of the State and the privacy of the citizen, great weight should be primarily attached by the judiciary to the opinion of the legislative branch of the Government, and as we have shown ante (pp. 6–20) Congress has recognized the necessity, if prohibition is to be effective, that vehicles on public highways should be searched, where there is any reasonable ground for believing that they are operated in violation of law. We do not contend that the declaration of the legislative branch of the Government is conclusive upon the

judiciary. Upon the latter finally rests the solemn duty of protecting the citizen in his fundamental rights, but as the question of reasonableness primarily turns upon considerations of common experience, great weight should be given to the legislative direction.

The judiciary may well also have regard to the judgment of the Executive Branch of the Government unless it is plain that it is animated, as it was in the case of the General Warrants agitation in England, by political considerations of a tyrannical character. Certainly when the Executive Branch of the Government and the legislative department are in accord that the crime wave can not be ended if the automobile is allowed to use the highway without ample opportunity to prevent its unlawful use, then the judicial department of the Government should be slow to decide that that is unreasonable which two coordinate branches of the Government have regarded as reasonable.

Nothing is more striking or portentous than the growth in the last quarter of a century in crime. Once holdups by highwaymen and bandits were rare even in the unsettled portions of the country. To-day they are commonplaces in our greatest and most populous cities. Once murder was so rare as to be regarded abnormal. To-day in our largest cities hardly a day passes that there is not an atrocious murder, while banditry is so common that it is literally true that in our large cities the days of Dick Turpin and Jack Sheppard have returned. Beyond the possibility of dispute this is largely due to the use of the

public highway by the automobile and to the automatic pistol. If our definition of the word "reasonable" is correct, then can it be questioned that in this matter, if life and property are to be made safe in the large cities of our country, the public interest outweighs that incidental sacrifice of privacy which the search of an automobile—when there is reasonable ground for suspecting that it is being used in furtherance of crime—may entail. If a policeman in New York City immediately after he has heard a pistol shot sees a couple of known thugs and gunmen in a motor car running it at the rate of sixty miles an hour, is he obliged to go to a magistrate and get a warrant to stop the car and to detain the gunmen?

Respectfully,

JAMES M. BECK,
Solicitor General.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

MARCH, 1924.

APPENDIX A.

CITY OF NEW YORK,
POLICE DEPARTMENT,
February 25, 1924.

Hon. JAMES M. BECK,
Solicitor General, Washington, D. C.

MY DEAR MR. BECK:

Your inquiry, under date of February 15th, was duly received, and your observations regarding the difficulty of the pursuit, detection, and arrest of criminals, caused by the frequent use of high-powered automobiles in the commission of crime, is intensely interesting.

For some years past the frequent use of high-powered motor vehicles as a means of escape from the place where a crime is committed, as well as an efficient means of getting away with loot, has been of great concern to this Department and, indeed, to police authorities throughout the World. The modern high-power motor vehicle furnishes the desperate criminal with facilities by the use of which he has a great advantage over police authorities and peace officers charged with the enforcement of the criminal law. This fact in the criminal's favor and the progressive use of motor vehicles in the commission of crime was recognized by me several years ago as an important factor concerning the enforcement of law and order.

In March of last year I called the attention of our Legislature to the imperative necessity of incorporating in our Penal Law proper provision to cope with this problem and submitted a proposed amendment to the law making the crime of robbery by the use of a motor vehicle robbery in the "first degree." This was enacted into law in this State by Chapter 504, Laws of 1923. But it is also imperative that our criminal procedure should be amended to provide peace officers with proper authority to stop such motor vehicles for the identification of drivers and passengers and an examination for property that may be acquired in the commission of crime. The use of such motor vehicles by criminals armed with that popular weapon of murder and robbery, the automatic pistol, is a public menace, which demands that our ancient law be so amended as to cope with these modern facilities that are laid hold of by desperate criminals in their unlawful enterprises.

I am pleased to know that the obvious necessity for a proper amendment to our criminal law and procedure to cope with modern inventions, such as the automatic pistol and high-power automobile, has been recognized by the Federal Government, and trust that your efforts in this behalf will meet with merited success.

With assurances of my great personal regards, I am,

Very truly yours,

R. E. ENRIGHT,
Police Commissioner.

89023—24——6

Appendix B.

Commonwealth v. *Street and Street; Commonwealth* v. *Cella.*

Petition to enjoin use in evidence of property seized in violation of defendants' constitutional rights. Q. S. Phila. Co., Sept. Sess., 1923, Nos. 690, 691, and 631.

Joseph K. Willing, Charles E. Fox, Assistant District Attorneys, and Samuel P. Rotan, District Attorney, for Commonwealth.

Henry M. Stevenson, for defendants.

Stern and Gordon, JJ., Dec. 10, 1923: On Aug. 25, 1923, at about half-past one in the morning, Ernest Street, Alvin Street, and Louis L. Cella, defendants in the above cases, were each driving a five-ton truck on the Roosevelt Boulevard, in Philadelphia. Three detectives, having received information that trucks of beer were going over the Boulevard to New York, stationed themselves at Castor Road and stopped the defendants' vehicles at that point. They announced to the drivers that there were officers of the law and asked them what they had on their trucks. Ernest Street and Louis E. Cella said that they did not know; Alvin Street said, "I've got beer." Thereupon the defendants were requested to open the trucks, which they did, and it was discovered that each truck contained a load of sixty half-barrels of beer, later upon analysis found to contain from 2.25 to 2.35 per cent by volume of alcohol.

The testimony disclosed that at and immediately before the seizure and opening of the trucks the defendants had not been violating any of the traffic

regulations or otherwise committing any apparent breach of the peace, that the trucks were all closed in such a manner that the contents were not visible, neither was there any odor of beer discernible until after the search had proceeded. It is also a fact admitted by the officers that they had no warrant of arrest or of search.

The defendants were arrested and indicted for the transportation and illegal possession of intoxicating liquor. When the cases were called for trial counsel for defendants presented petitions in each of the cases, alleging that the searches and seizures of the trucks and their contents were in violation of the Constitution and of the acts of assembly of the State of Pennsylvania, and praying that the court restrain the district attorney, the director of public safety, and their assistants, officers, and detectives, from offering at the trial any of the evidence or articles seized as aforesaid, and from testifying to any facts learned by them at the time of said searches and seizures or in consequence thereof. The trial judge continued the trial of the cases until the prayer of the petitioners should be disposed of as a preliminary proceeding, and it is these petitions which are now before the court for consideration.

Counsel for the defendants conceded at the bar of the court in argument that the petition must fall as to the defendant, Alvin Street, because, he having stated that he had beer on his truck, this admission in itself amounted to such reasonable and probable cause of belief that the law was being violated as to justify the officers in seizing and searching the truck. On the other hand, it is apparently conceded by the Commonwealth that, as to the two other defendants, the mere fact that when asked by the

officers whether they would open the trucks, they said, "yes," and proceeded to do so, does not constitute such a voluntary acquiescence on their part as to amount to a waiver of their constitutional rights. This concession on the part of the Commonwealth is justified by the established principle that where an officer politely, decently, and without physical threat has assumed to act in his official capacity, a peaceful citizen who does not forcibly resist the action, even though he knows the officer to be exceeding his authority, is held not to have acquiesced in the unlawful search or arrest: United States *v.* Slusser, 270 Fed. Repr. 818; United States *v.* Rembert, 284 Fed. Repr. 996, and cases there cited.

It is to be noted that the defendants' petitions do not ask that the seized liquor be returned. Defendants admit that, whether the search and seizure were lawful or unlawful, the liquor itself is contraband and the defendants have no property rights therein. The beer, by virtue of the National Prohibition Act (41 Stat. 305, Act of Oct. 28, 1919, ch. 85, title II, § 25) and the corresponding act in our own State (Act of March 27, 1923, § 11*a*, P. L. 34), was forfeited the moment the defendants embarked upon the unlawful transportation, and, therefore, under no possible view of the case, have they any right to a return of the property seized. Moreover, there is no law requiring or justifying the return of property to any one whose possession of it constitutes a crime or whose use of it is only for the purpose of committing a crime; Rosanski *v.* State, 140 N. E. Repr. (Ohio) 370; People *v.* Case, 190 N. W. Repr. (Mich.) 289; People *v.* Bowen, 198 N. Y. Supp. 306; State *v.* Chuchola, 120 Atl. Repr. (Del.) 212; United

States *v.* Kaplan, 286 Fed. Repr. 963; United States *v.* Fenton, 268 Fed. Repr. 221; United States *v.* O'Dowd, 273 Fed. Repr. 600; United States *v.* Dziadus, 289 Fed. Repr. 837; Pasch *v.* People, 209 Pac. Repr. (Colo.) 639; United States *v.* Alexander, 278 Fed. Repr. 308.

The Commonwealth, in its answers to the petitions, raises the question of the jurisdiction of the court, contending that the prayer is for an order in the nature of an injunction which can be made only by a court of equity. There exists, however, abundant authority for the proposition that the Court of Quarter Sessions which is charged with the trail of the cause can determine, and indeed alone can determine, the relevancy of the evidence presented for its consideration, can control the disposition of documents and other physical articles submitted or proposed to be submitted as evidence, and can direct the district attorney and other officers and witnesses presented by the Commonwealth with regard to testimony proposed to be offered by them. The property in question being seized under the claim of judicial process and thus brought under the control of the trial court is beyond reach of a writ of replevin or other remedy. Applications of the kind here involved have generally been treated as incidental to criminal prosecutions pending in the court to which they are made: Burdeau *v.* McDowell, 256 U. S. 465; United States *v.* Hee, 219 Fed. Repr. 1019; In re Chin K. Shue, 199 Fed. Repr. 282; United States *v.* Maresca, 266 Fed. Repr. 713; United States *v.* McHie, 194 Fed. Repr. 894; United States *v.* Friedberg, 233 Fed. Repr. 313; In re Weinstein, 271 Fed. Repr. 5; Weinstein *v.* Attorney General, 271 Fed. Repr. 673; United States *v.* Mills, 185 Fed. Repr. 318; Wise *v.*

Henkel, 220 U. S. 556; 1 Bishop on Criminal Procedure §210; Rex *v.* Barnett, 3 C. & P. 600; Rex *v.* Kinsey, 7 C. & P. 447. The state courts similarly offer a continuous course of precedents for the present practice.

The decision of these preliminary matters thus brings us to the main questions presented by the petitions, which we conceive to be three in number, namely:

1. Have police officers authority, either under legislative enactment or the principles of the common law, to make a search and seizure such as that which occurred in the present causes?

2. Assuming that such authority exists, is it valid in view of the constitutional provision regulating searches and seizures?

3. If the searches and seizures now in question were unconstitutional and, therefore, invalid, is the evidence obtained by the officers as a result thereof nevertheless admissible at the trial of the defendants?

1. The statutory authority justifying the action of the officers is that contained in the National Prohibition Act (41 Stat. 305, Act of Oct. 28, 1919, ch. 85, title II, § 26), which provides as follows: "When the commissioner, his assistants, inspectors or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air or water

craft, or any other conveyance, and shall arrest any person in charge thereof." And the state act of March 27, 1923, § 9, P. L. 34, which provides: "When any officer shall discover any person in the act of transporting, in violation of this act, intoxicating liquor in any wagon, buggy, motor-vehicle, water or air craft, or other vehicle or receptacle, or otherwise, it shall be his duty to seize any and all intoxicating liquor and container found therein, being transported contrary to law, with or without a warrant. Whenever intoxicating liquor, transported or possessed illegally, shall be so seized by any officer, he shall take possession of the vehicle and team, or motor-vehicle, boat, air or water craft, or any other conveyance or receptacle, and shall arrest any person in charge thereof."

It will thus be seen that the Pennsylvania statute expressly gives the right to an officer to make a seizure "with or without a warrant" if he shall "discover" the person in the act of transporting intoxicating liquor. The word "discover," which also appears in the Federal act, has been made the subject of extended discussion respecting its connotation as thus employed in this legislation. Some courts have taken the ground that by "discover" is meant that the officer without any preliminary manual action must actually see, hear, or smell the liquor. This has resulted in a fineness of interpretation which makes the subject amusing. A bottle of liquor may be so inclosed as to make visual evidence of its existence impossible, and thus an officer would be denied the right of further examination in order to enforce the law and apprehend the lawbreaker. It is argued that if the liquor be so concealed in the passing automobile as to render it invisible, the officer

is powerless to act, whereas if the cork of a bottle protrudes, or if a blanket be so carelessly placed over the contents of the vehicle as to allow a peep at the articles which it is intended to conceal, the officer is thereby afforded such reasonable and probable cause as to justify his further action. It is not believed that the practical and common-sense nature of our people and of the law which that nature has through so many centuries developed will permit of such academic and fine-spun distinctions. As a matter of fact, the word "discover" has no such limited meaning. As defined in Webster's International Dictionary, it means to "uncover; to remove or lift (any covering); to lay open to view; to reveal; to make known; to show (what has been secret, unseen, or unknown); to manifest; to show; exhibit; betray; to explore; examine; reconnoiter; to obtain for the first time sight or knowledge of, as of a thing existing already, but not perceived or known; to find out; to ascertain; espy; detect; descry." In other words, the essential nature of the word "discover" involves, not a facile observation, but rather a detection as the result of preliminary measures by way of uncovering, revealing, and laying open to view. The very etymological analysis of the word would suggest an uncovering rather than a mere observation of something already exposed to the action of the senses.

We readily conclude, therefore, that both the Federal and state acts do not intend by the use of the word "discover" to limit the right of the officer to proceed only upon the evidence of the optic, auditory or olfactory nerves, but, on the contrary, were intended to and do give such right when a "discovery" is made as the result of an "uncovering," "reveal-

ing" or "exploring." Furthermore, the state act expressly provides (section 8) that "the right to a search warrant, as provided for in this section, shall be in addition to all other rights of search and seizure now existing under law," and at common law officers have had the right from time immemorial to conduct reasonable searches and seizures without warrant.

We, therefore, have no hesitation in concluding that officers are vested with authority to make a search and seizure of the kind here in question unless prohibited by the Constitution of the State.

2. This, therefore, brings us to the second question in the case: Did the search and seizure here involved violate the constitutional rights of the defendants? If the state act be thus interpreted as conferring authority upon the officers of the law to the extent exercised in the present instance, is it unconstitutional, and does the Constitution also bar the common law rights of search and seizure above referred to? Incidentally, it may be noted that the 4th Amendment to the Federal Constitution does not apply to state laws.

Article I, section 8, of our State Constitution provides that "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

It is elementary that search warrants and warrants of arrest are not required in all cases. Arrests and searches and seizures without preliminary affidavits and warrants have long existed in practice. The only limitation prescribed in the Constitution is

that such searches and seizures shall not be "unreasonable," and, therefore, the only question involved is whether the search and seizure here complained of was or was not "unreasonable."

We are not unaware of the importance and gravity of the question thus presented; on the contrary, we are impressed by the fact that it is but a phase of that conflict which has existed throughout history between the desire, on the one hand, for a strong and efficient police system, insuring safety to the citizens, and on the other, for a proper protection to those individual rights and liberties so dearly prized by the Anglo-Saxon people above all other races and nations. The constitutional right here invoked probably had its origin in the doctrine of the famous Wilkes Case (19 Howell's State Trials, 981), and that of Entick *v.* Carrington (19 Howell's State Trials, 1029), decided by Lord Camden in 1763 and 1765, respectively. The 4th Amendment, as written into the Federal Constitution, followed somewhat similar provisions in the Constitutions of Virginia and Massachusetts, largely resulting from the resentment caused by the Colonial authorities of Massachusetts Bay issuing general search warrants known as "writs of assistance," which were general commands to search for smuggled goods wherever it was suspected that such could be found. These writs were the subject of the great speech by James Otis in 1761 in Paxton's Case (Quincy's Reps. 51)—a landmark in American history which was characterized by John Adams as constituting the birth of the "child" Independence.[1]

[1] For a history of the origin of the constitutional provision see note by Frank W. Grinnell, in the Massachusetts Law Quarterly for August, 1922, page 43, *et seq.* The 4th and 5th Amendments to the Federal Constitution have an entirely different history, although they are often confused. The 5th Amendment is to be traced back to an agitation conducted in the sixteenth and seventeenth centuries, and especially to that of "Freeborn John" Lilburn.

The protection granted by the Constitution thus having its roots in revolutionary times and being a result of the colonists' experience with despotism, is not to be regarded lightly nor frittered away. On the other hand, while vital principles are and ought to be unchangeable, regard must be had to the fact that in their application to changing conditions the security and consequent happiness of the body politic must be protected against an academically rigid interpretation of theoretical rights which those who originally enunciated the doctrine would be the first to disavow.

The importance of the question involved is augmented by the fact that it is in no sense confined to the temporary controversy now being waged around the enforcement of the liquor laws. The fact that intoxicating liquor is involved in the case at hand is merely casual and accidental. If the right here under investigation does or does not exist with regard to intoxicating liquor, it similarly does or does not exist with regard to narcotic drugs, weapons of crime and other instrumentalities used by the criminal classes in the warfare constantly maintained by them against organized society. The right to stop and search an automobile for liquor is no different from the right to stop and search an automobile to see whether or not it contains an infernal machine, opium, or a bandit concealed beneath a laprobe, or, indeed, to discover whether or not the operator of the vehicle has in his possession the license card provided by the automobile statutes of the State. The question, therefore, must be removed from the atmosphere of the prohibition acts into one of the general extent of the police power under similar circumstances.

Furthermore, the distinction must be borne in mind between the existence and the possible abuse of power. Any conceded power may be employed in such a tactless and arbitrary manner as to amount to oppression. A municipal department of public safety, if overzealous in attempting to enforce any law, may justly provoke the citizens of a municipality into an attitude of irritation and opposition.

Having regard for these considerations as a background to the question for determination, the court believes that the search and seizure in the present cases was not unreasonable, and therefore not in violation of the Constitution for the following reasons:

(*a*) In the first place, the very use of the term "unreasonable" in the Constitution showed an intent on the part of the framers to leave to future generations and varying circumstances the question as to what, under given conditions, is or is not an "unreasonable" search and seizure. The term is like that of "excessive bail," "excessive fines," "freedom of speech," "cruel and unusual punishment," etc. Whether a search is or is not unreasonable depends upon the circumstances, and is not influenced by the fact that it is without warrant. A search without warrant may be reasonable, and a search with warrant may be unreasonable: O'Connor *v.* United States, 281 Fed. Repr. 396; United States *v.* McBride, 287 Fed. Repr. 214; Agnello *v.* United States, 290 Fed. Repr. 671; United States *v.* Snyder, 278 Fed. Repr. 650. See also Wakely *v.* Hart, 6 Binney, 316. For example, nobody has ever doubted the reasonableness of searching persons and their baggage upon entering the country, even though they be citizens returning from a temporary sojourn abroad,

and no one has ever asserted the necessity of a search warrant for such proceeding. So, with the greater development of social organization and complexities in industrial life, the bureaus and departments of government are constantly sending agents to search premises without specific warrants for the purpose of ascertaining whether factories or workshops are employing child labor or unguarded machinery in violation of law; to inspect mines, elevators, fire escapes, the manufacture of food products and the like. These instances are cited merely to show that the question as to what is or is not a reasonable search changes with the changing habits, conditions, and views of society.

That being so, what is the situation with regard to the search of automobiles? These are a development of very modern times. To obtain a search warrant for use in connection with a fleeting automobile upon the highways is impossible, and yet, as every one knows, the automobiles have revolutionized crime and its possibilities. Unless the right to search vehicles without warrant exists, the subjecting of the community to the perpetration of crime is greatly intensified. The fact that it is convenient or desirable that this right should exist is, of course, not a conclusive argument that it does exist, but it is eminently a fair consideration in determining whether or not the exercise of it is "reasonable." This view of the matter is well expressed in People *v.* Case, 190 N. W. Repr. (Mich.) 289, where it is said: "The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in battalions, until the slower, animal-drawn vehicles, with their easily noted individuality,

are rare. Constructed as covered vehicles to standard form in immense quantities, and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious question far deeper and broader than their use in so-called 'bootlegging' or 'rum-running,' which in itself is no small matter. While a possession in the sense of private ownership, they are but a vehicle constructed for travel and transportation on highways. Their active use is not in homes nor on private premises, the privacy of which the law especially guards from search and seizure without process. The baffling extent to which they are successfuly utilized to facilitate commission of crime of all degrees, from those against morality, chastity and decency to robbery, rape, burglary and murder is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws. Whether search of and seizure from an automobile upon a highway or other public place without a search warrant is unreasonable is, in its final analysis, to be determined as a judicial question, in view of all the circumstances under which it is made." See, also, United States *v.* Rembert, 284 Fed. Repr. 996; United States *v.* Bateman, 278 Fed. Repr. 231; Houck *v.* State, 140 N. E. Repr. (Ohio) 112.

We are impressed by the thought that the makers of the Constitution, in this, as in so many other clauses of that document, used general phraseology because they foresaw developments of civilization

which would require adaptation of principles to necessities arising from changing conditions, and we believe that the search of an automobile without a warrant is not "unreasonable" within the meaning of the Constitution, although a similar search of a stationary or permanent habitation might, under otherwise identical circumstances, be wholly unreasonable.

(*b*) We arrive at the same conclusion from another aspect of the question with reference to the nature and use of automobiles. When the Constitution was adopted, the only subjects to which the 4th Amendment could apply were the persons of the individual citizens, their homes, and their stores and warehouses. The rights of a person to privacy, to living in his home uninterrupted by official espionage, and to conducting the ordinary mercantile pursuits, were all antecedent in point of time to the organization of the Federal Government and to the formulation of its Constitution and laws. These rights were what the eighteenth century French philosophers would have called "natural rights," and as such they were peculiarly the subject of protection against the despotism of organized society and of its official representatives. Automobiles, viewed from the standpoint of personal property, are in an entirely different position. No one has a right to operate a motor-vehicle upon the highways of the Commonwealth or of a municipality without a preliminary license granted by the State. No one needs such a license to live, to inhabit a home, or to transact most lines of industry. There are, however, certain activities—for example, the sale of liquor in preprohibition days, the conducting of a pawnshop, and the like—which can not be carried on except by special per-

mission, and as to which no one has a natural or inalienable right. The operation of a motor vehicle is in this class. The automobile, an invention of recent origin, is peculiarly the subject of governmental control, and were this not so modern life and society would be hopelessly imperiled. If, therefore, it be true, as it is true, that a citizen has no right to use or to operate an automobile at all without permission from the Commonwealth, it must follow that one must obtain such permission *cum onere*, that is, subject to such control or limitations as the State may see fit to impose upon its licensees as conditions precedent to its enjoyment. Can anyone doubt, for example, that in granting a license the State may constitutionally provide, as in fact it does provide, that every operator of a motor vehicle may be stopped at any time by an officer and made to exhibit his license card, and may even be compelled to write his name in the presence of the officer for the purpose of establishing his identity, or that any vehicle may be stopped by an officer for the purpose of inspecting it as to its equipment and operation and for securing "such other information as may be necessary"? Act of June 14, 1923, §23, P. L. 718.

In short, the court is of opinion that the constitutional provision as to searches and seizures is quite distinguishable in its application to individuals, their habitations and business places on the one hand, and to motor-vehicles on the other, because the rights in the one case are entirely independent of government, and in the other are derived wholly from the state. And while we are not prepared to say that there are no limitations of the power of the state even under such circumstances, we are of opinion that in construing the constitutional clause

as to the unreasonableness of searches and seizures, such construction is properly to be varied when applied to inalienable rights over which the state has no control, and when applied to those industries and kinds of property (including, as above pointed out, automobiles) as to which no rights exist except in so far as the state may see fit to confer them.

It must be admitted that for the distinction thus drawn no authority in the law books as yet exists,[2] neither was it the subject of argument in the present case, but in principle it seems to the court to be fundamental and to be in accord with the doctrines of the common law and of constitutional interpretation.

(c) The next distinguishing feature in the present case which, in the opinion of the court, removes it from the constitutional inhibition, is the fact that the act of the officers under consideration was not directed to the securing of evidence of a crime committed, but to the actual suppression of a crime then in course of perpetration. It is, of course, an elementary legal principle that, a crime having been completed, no right of search or seizure on the part of governmental agencies exists for the purpose of obtaining evidence which may be desired to prove the fact of the crime or the identity of the criminal who committed it. In the present case, however, when the officers stopped the automobiles, the operators of the vehicles were then and there in the midst of committing the crime of the illegal transportation of intoxicating liquor, and every revolution of the wheels of the trucks was a part of the perpetration of the offence. To hold, under such circumstances, that what the officers did was illegal would lead to this

[2] An intimation, however, is to be found in the opinion of Stewart, P. J., in Com. v. Schwanda, 19 North. 37; s. c., 71 P. L. J. 529.

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reductio ad absurdum, that the search having actually been made, the officers would be obliged, in effect, to apologize for their unwarranted interference and to allow the defendants to proceed upon their criminal journey. In other words, although then knowing that a crime was in progress, the officers would have no right to check it, but must allow the vehicles to proceed in a continued perpetration of the illegal act. It is difficult to see upon what principle, either of ordinary logic or intuitive common sense or legal authority, such a view is tenable. Suppose, for example, that a person, by reason of an unwarranted trespass upon another's property, happens to come into a room where a murder is being committed; will his unwarranted entry legally prevent his interposition to stop the crime? No matter how the information of the offense be obtained, whether by legal or illegal measures, can it be possible that there is anything in the law to disqualify the discover[er] from taking all reasonable measures to prevent further infraction of the law? If, in the present case, the officers had allowed the defendants to proceed upon their way, would they not thereby have made themselves in effect accomplices or accessories to such part of the crime of the illegal transportation of intoxicating liquor as thereafter would have ensued in the continued journey of the trucks? And by what other method could the defendants be prevented from further violating the law than by the officers seizing the instrumentalities by which the crime was then and there being committed, namely, the automobiles themselves and their illegal contents?

We have here, therefore, the marked difference between a search and seizure of evidence of a past crime and the stopping of a crime in actual progress,

and it is not believed that there is any intendment or implication in any constitutional provision which would tie the hands of police officers under such circumstances. This thought seems to have been the dominant one in the recent case of Com. *v.* Klein and Goodstein, 81 Pa. Superior Ct. 551, where it was said, per Mr. Justice Linn: "Appellants contend the seizure of the liquor was illegal, and that it was wrong to admit any of it in evidence. As no objection was made to this evidence during the trial, we might dismiss the assignment without further notice, but it is not apparent that it was objectionable; the parties were arrested, as the verdict establishes, committing a crime; it was proper to take and put in evidence the means by which they were committing it."

And to the same effect is the statement of the court in United States *v.* McBride, 287 Fed. Repr. 214: "Now we see that no warrant shall be issued but upon probable cause, etc. This certainly contemplates that a crime has been committed, and there is probable cause to believe that the defendant has committed it, or has certain things used in the commission of it, etc., which he is secreting, and describing the thing and place. Now, if the crime, instead of having been committed or completed, is only in the process of commission, it is manifest no warrant could be issued. There must be a completed crime, an affidavit of probable cause, and thing to be seized. This makes a complete analogy to a warrant for the arrest of a person for the commission of an offence. If the offence has been committed, the officers must have a warrant to make the arrest; but if the offence is committed in his presence, he may arrest without a warrant. . . . The analogy between arresting

and searching without a warrant is complete and rests on the same propositions, viz, the necessities of the case." See, also, State *v.* Pauley, 192 N. W. Repr. (N. Dak.) 91.

(*d*) Analogous to this distinction is the fact that there is a difference between the seizure of the evidence of a crime and that of the instrumentality by which a crime is committed.

In Heywood *v.* United States, 268 Fed. Repr. 795, it is said: "Not all searches and seizures are forbidden. Consider, first, the character of the property that may be seized. It has never been deemed unreasonable to hunt for and take stolen property, smuggled goods, implements of crime, and the like. Inasmuch as the documents in question were the tools by means of which the defendants were committing the felonies, there was no immunity in the nature of the property."

In City of Sioux Falls *v.* Walser, 187 N. W. Repr. (S. Dak.) 821, it is said: "There is a wide distinction between the seizure of property lawfully in the possession of a person and the seizure of property which is being held and used in violation of law, and in and to which property, because of such violation of law, the person in possession can claim no property rights."

In People *v.* Bowen, 198 N. Y. Supp. 306, it is said: "When stolen property shall have passed into the custody of the law and is held for the rightful owner, the thief may not question the right of the officers of the law to hold it or the manner of their acquiring its possession. So, too, officers of the law, coming into the possession of that which is used to commit crime, may not be compelled to restore it to him who claims its ownership, although the officers have obtained it from him by illegal means. A party may not

rightfully have the possession of instrumentalities used for the commission of crime, or used in the commission of crime, and since he may not rightfully have the possession of such instrumentalities, he has not the right to require their possession. In the case under consideration the seizure was not illegal, for the reason that the papers seized, on the proofs presented on this motion, were instrumentalities used by the defendant in the perpetration of the crime with which he is charged. There is such a thing as unreasonable search, and this the law does not permit. Against this a man is protected; but when a man stands charged with crime, and the instruments are found upon his person or in his house, which were a part of the means by which he accomplished the crime, such instruments or papers are legitimate evidence against him, and may be taken from him and used for that purpose. If this be not so, the dagger with which the murderer strikes down his victim could not be taken from his pocket and used against him, for the reason that it belongs to him and is found upon his person."

In United States *v.* Welsh, 247 Fed. Repr. 239, it is said: "The cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers can not be seized and used as incriminating evidence. The *corpus delicti* itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is

in no real sense the property of the defendant, but is the very unlawful thing imported contrary to the statute. I think the district attorney is right in urging that any one could arrest the person carrying it, who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment and from the evidence adduced that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected."

In Boyd *v.* United States, 116 U. S. 616, it is said: "The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property; in the other it is not."

In United States *v.* McBride, 287 Fed. Repr. 214, it is said: "In considering what may be seized, the law draws a clear distinction between things forfeited, or that it was illegal for the person to have, and his mere private books and papers, etc., which contained evidence that could be used against him, permitting the seizure of the first and denying it as to the latter, though both were held in the same way. Such things

as might be seized could be admitted in evidence over defendant's objection, though they were taken from his possession and against his consent. . . . So we see that it is not the fact that the thing was taken from his possession and against his consent that was forbidden, but it was the character of the things taken and the method of taking. Such a thing as burglar tools, though bought or made by defendant, and belonging to him as much as his private books and papers, could be taken and used against him, and it was not compelling him to be a witness against himself to take them from him." See, also, State *v.* Pauley, 192 N. W. Repr. (N. Dak.) 91; Com. *v.* Klein and Goodstein, 81 Pa. Superior Ct. 551; State *v.* Krinski, 62 Atl. Repr. (Vt.) 37; State *v.* Simmons, 183 N. C. 684; State *v.* Chuchola, 120 Atl. Repr. (Del.) 212.

Thus we see that there is a well-established distinction in regard to a search or seizure the object and the result of which is to take private property in itself legitimate, but constituting evidence of the commission of a crime, and property the possession of which is unlawful because constituting the very instrumentality for the commission of the crime, as, for example, a burglar's tools, gambling devices, narcotic drugs, and the like. And, of course, intoxicating liquor falls within the latter class. It is, under the provisions of both the Federal and state acts, contraband. As said in People *v.* Case, 190 N. W. (Mich.) 289: "When its illegal possession or transportation begins, it at once becomes the property of the state. One searching for and seizing it does not search and seize property of the person in illegal possession, and if the state makes the seizure, it is but taking possession of its own property." To the same

effect are O'Connor *v.* United States, 281 Fed. Repr. 396; United States *v.* Fenton, 268 Fed. Repr. 221; United States *v.* O'Dowd, 273 Fed. Repr. 600; United States *v.* Hilsinger, 284 Fed. Repr. 585; United States *v.* Bateman, 278 Fed. Repr. 231; United States *v.* Snyder, 278 Fed. Repr. 650.

The conclusion, therefore, is that a search which is directed toward the obtaining of mere evidence is different from one directed toward the seizure of contraband or unlawful property, and a search for the latter may be reasonable in cases where a search for the former is not.

3. It has thus been demonstrated, in the opinion of the court, that searches and seizures of the kind involved in the present controversy are not unreasonable, and, therefore, not unconstitutional, because of the four reasons above pointed out, namely, (1) that the nature of the use of automobiles makes it impossible to employ search warrants in the detection of crime committed by their means, and, therefore, the absence of such warrants can scarcely be said to be "unreasonable;" (2) that since the operation of automobiles must be licensed by the state, the constitutional provision does not apply to them in the same manner and to the same degree as in the case of one's person, dwelling house, place of business, or the like; (3) that a search and seizure is justified in order to suppress the commission of a continuing crime as contrasted with a search for evidence of a crime already committed; and (4) that such a search and seizure is different as to its reasonableness when it aims to secure the instrumentality of crime from when it seeks merely to obtain evidence of crime. Apart from this conclusion, however, as to the constitutionality of the search and seizure, we are of the

opinion that the petitioners' case must fall because of the answer to be given to the final question involved in this discussion. Even assuming the invalidity of the search and seizure, is the evidence obtained by the officers as a result thereof nevertheless admissible at the trial of the defendants?

[Here follows an extended discussion of the admissibility in evidence at the trial of the defendants, of property searched for and seized. This is omitted, as we consider that question settled by the prior decisions of this Court.]

Finding, therefore, that the Pennsylvania authorities are thus in accord with the prevailing doctrine adverted to, we summarize our conclusions as follows:

1. Both the State legislation and the common law furnish authority to police officers to stop, and, with or without a warrant, to search motor vehicles for contraband or other instrumentalities of crime—a power, however, which, of course, should never be abused by an over-zealous police administration.

2. The authority thus referred to is valid and lawful, and does not contravene the constitutional rights of citizens against unreasonable searches and seizures.

3. Even, however, if such search and seizure be unconstitutional, and, therefore, invalid, the physical evidence secured thereby as well as the testimony of the officers in regard to its discovery are competent evidence upon the trial of the criminal cause, and will not be excluded because of any alleged illegality in the method by which such evidence and testimony were obtained.

The result is that we conclude that the defendants' petitions should be, and they are, dismissed.

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SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1924.

George Carroll and John Kiro, Plaintiffs in Error, *vs.* The United States	Error to the District Court of the United States for the Western District of Michigan.

[March 2, 1925.]

This is a writ of error to the District Court under Section 238 of the Judicial Code. The plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to wit: 68 quarts of so-called bonded whiskey and gin, in violation of the National Prohibition Act. The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whiskey and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: On September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kruska, and the two defendants, Carroll and Kiro. Cronenwett was introduced to them as one Stafford working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whiskey. The price was fixed at $130 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away and in a short time Kruska came back

and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile Roadster, the number of which Cronenwett then identified, as did Scully. The proposed vendors did not return the next day and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser whom Carroll subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro going eastward from Grand Rapids in the same Oldsmobile Roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully who was taking lunch, that the Carroll boys had passed them going toward Detroit and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett on their regular tour of duty with Peterson, the state officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile coming from the direction of Detroit to Grand Rapids. The government agents turned their car and followed the defendants to a point some sixteen miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskeys, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whiskey and gin. When the defendants were arrested, Carroll said to Cronenwett, "Take the liquor and give us one more chance and I will make it right with you," and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer and Scully remained on the road looking for other cars, of whose coming they had information. The officers were not antici-

pating that the defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor; and hence the search, seizure and arrest.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the Act, or which has been so used, and provides that no property rights shall exist in such liquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 26, Title II, under which the seizure herein was made, provides in part as follows:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be eized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water

craft, or any other conveyance, and shall arrest any person in charge thereof."

The section then provides that the court upon conviction of the person so arrested shall order the liquor destroyed, and except for good cause shown shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States.

By Section 6 of an Act supplemental to the National Prohibition Act, c. 134, 42 Stat. 222, 223, it is provided that if any officer or agent or employee of the United States engaged in the enforcement of the Prohibition Act or this Amendment, "shall search any private dwelling," as defined in that Act, " without a warrant directing such search," or "shall without a search warrant maliciously and without reasonable cause search any other building or property," he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental Act through the Senate, Amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:

"Section 6. That any officer, agent or employee of the United States engaged in the enforcement of this Act or the National Prohibition Act, or any other law of the United States, who shall search or attempt to search the property or premises of any person without previously securing a search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $1000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the Court."

This Amendment was objected to in the House, and the Judiciary Committee, to whom it was referred, reported to the House of Representatives the following as a substitute.

"Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this Act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor, shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by

a fine of not to exceed $1000 or imprisonment not to exceed one year, or both such fine and imprisonment, in the discretion of the court."

In its report the Committee spoke in part as follows:

"It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the national prohibition act and would otherwise seriously interfere with the Government in the enforcement of many other laws, as its scope is not limited to the prohibition law but applies equally to all laws where prompt action is necessary. There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeable to the Constitution search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is as a rule contained in the various State constitutions, but notwithstanding that fact search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation.

"The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises.

"Not only does this amendment prohibit search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of."

The conference report resulted, so far as the difference between the two Houses was concerned, in providing for the punishment of any officer, agent or employee of the Government who searches a "private dwelling" without a warrant, and for the punishment of any such officer, etc., who searches any "other building or property" where, and only where, he makes the search without a warrant "maliciously and without probable cause." In other words, it left the way open for searching an automobile, or vehicle of trans-

portation without a warrant, if the search was not malicious or without probable cause.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is *Boyd* v. *United States*, 116 U. S. 616. An Act of Congress of June 22, 1874, authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that under the Fourth Amendment the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against himself or be in the attitude of confessing his guilt.

In *Weeks* v. *United States*, 232 U. S. 383, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

In *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested and while under arrest the marshal had gone to the office of the company without a warrant and made a clean sweep

of all books, papers and documents found there and had taken copies and photographs of the papers. The District Court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment and the judgment for contempt was reversed.

In *Gouled* v. *United States,* 255 U. S. 298, the obtaining through stealth by a representative of the Government from the house of one suspected of defrauding the Government of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that when the paper was offered in evidence and duly objected to it must be ruled inadmissible because obtained through an unreasonable search and seizure and also in violation of the Fifth Amendment because working compulsory incrimination.

In *Amos* v. *United States,* 255 U. S. 313, it was held that where concealed liquor was found by government officers without a search warrant in the home of the defendant, in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the defendant, because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.

On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In *Boyd* v. *United States,* 116 U. S. 616, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle on which the Fourth Amendment proceeds, and to avoid any misapprehension of what was decided, the court, speaking

through Mr. Justice Bradley, used language which is of particular significance and applicability here. It was there said (page 623):

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. Commonwealth v. Dana, 2 Met. (Mass.) 329. Many other things of this character might be enumerated."

It is noteworthy that the twenty-fourth section of the Act of 1789 to which the court there refers provides

"That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they have have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such

house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Like provisions were contained in the Act of August 4, 1790, c. 35, Sections 48-51, 1 Stat. 145, 170; in Section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315, and in Sections 68-71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. Compare *Hester* v. *United States*, 265 U. S. 57.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial and forfeiture. This Act was renewed April 27, 1816, 3 Stat. 315, for a year and expired. The Act of February 28, 1865, revived Section 2 of the Act of 1815, above described, c. 67, 13 Stat. 441. The substance of this section was reenacted in the third section of the Act of July 18, 1866, c. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as Section 3061. Neither Section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. Indeed that section was referred to and treated as operative by this Court in *Cotzhausen* v. *Nazro*, 107 U. S. 215, 219. See also *United States* v. *One Black Horse*, 129 Fed. 167.

Again by Section 2140 of the Revised Statutes any Indian agent, sub-agent or commander of a military post in the Indian country,

having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced any spirituous liquor or wine into the Indian country, in violation of law, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched and if any liquor is found therein, then it, together with the vehicles, shall be seized and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat. 682, authorizing Indian agents to cause the goods of traders in the Indian country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian country to be seized and forfeited if found; and of the Act of June 30, 1834, Section 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian country to cause the boats, stores or places of deposit of such person to be searched and the liquor found forfeited. This court recognized the statute of 1822 as justifying such a search and seizure in *American Fur Co.* v. *United States*, 2 Pet. 358. By the Indian Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian territory may be seized, libelled and forfeited as provided in the Revised Statutes 2140.

And again in Alaska, by Section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors or any person authorized by them in writing shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to fine, penalties or forfeiture under the Act and to keep and deliver the same, and the Attorney General, in construing the Act, advised the Government: "If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the 3-mile limit according to the practice of customs officers when acting under section 3059 of the Revised Statutes, and to seize such vessels." 26 Opinions Attorneys General 243.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a

necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile for contraband goods where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, Title II, of the National Prohibition Act, like the second section of the Act of 1789, for the searching of vessels, like the provisions of the Act of 1815, and Section 3601, Revised Statutes, for searching vehicles for smuggled goods, and like the Act of 1822, and that of 1834 and Section 2140, R. S., and the Act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and thirdly, the driver was to be arrested. Under Section 29, Title II, of the Act the latter might be punished by not more than $500 fine for the first offense, not more than $1,000 fine and 90 days' imprisonment for the second offense, and by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense. Thus he is to be arrested for a misdemeanor for his first and second offenses and for a felony if he offends the third time. The main purpose of the Act obviously was to deal with the liquor and its transportation and to destroy it. The mere manufacture of liquor can do little to de-

feat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under Section 28, Title II, of the Prohibition Act the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes, providing that:

"When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizures, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

It follows from this that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. *Stacey* v. *Emery*, 97 U. S. 642. The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.

We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the

Weeks and *Amos* cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. *United States* v. *Kaplan*, 286 Fed. 963, 972.

But we are pressed with the argument that if the search of the automobile discloses the presence of liquor and leads under the statute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common law rule as to the circumstances justifying an arrest without warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence. *Kurtz* v. *Moffitt*, 115 U. S. 487; *Elk* v. *United States*, 177 U. S. 529. The rule is sometimes expressed as follows:

"In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." Halsbury's Laws of England, Vol. 9, part III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, 1 Stephen, History of Criminal Law, 193, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant. *Rohan* v. *Sawin*, 5 Cush. 281. The argument for defendants is that as the misdemeanor

to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it. *Elrod* v. *Moss,* 278 Fed. 123; *Hughes* v. *State,* 145 Tenn. 544.

So it is that under the rule contended for by defendants the liquor if carried by one who has been already twice convicted of the same offense may be seized on information other than the senses, while if he has been only once convicted it may not be seized unless the presence of the liquor is detected by the senses as the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental as shown by the lightness of the penalty. See *Commonwealth* v. *Street,* 3 Pa. Dist. & Co. Reports, 783. In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present Federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular affenses as felonies or misdemeanors. As the main purpose of Section 26 was seizure and forfeiture, it is not so much the owner as the property that offends. *Agnew* v. *Haymes,* 141 Fed. 631, 641. The language of the section provides for seizure when the officer of the law "discovers" any one in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to that mental process to what the officer sees, hears or smells as the automobile rolls by and excludes therefrom when he identifies the car the convincing information that he may have previously received as to the use being made of it.

We do not think such a nice distinction is applicable in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. *Weeks* v. *United States,* 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Crimi-

nal Procedure (10th edition), Sec. 97. The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates. It is true that Section 26, Title II, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under Section 25 of the same title. The character of the offense with which, after the contraband liquor is found and seized the driver can be prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform, *Houck* v. *State*, 106 Ohio St. 195, accords with this conclusion. *Ash* v. *United States*, 299 Fed. Rep. 277 and *Milam* v. *United States*, 296 U. S. 629, decisions by the Circuit Court of Appeals for the fourth circuit take the same view. The *Ash* case is very similar in its facts to the case at bar and both were by the same court which decided *Snyder* v. *United States*, 285 Fed. 1, cited for the defendants. See also *Park* v. *United States* (1st C. C. A.) 776, 783, and *Lambert* v. *United States*, (9th C. C. A.) 282 Fed. 413.

Finally, was there probable cause? In *The Apollon*, 9 Wheat. 362, the question was whether the seizure of a Franch vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion Mr. Justice Story, who delivered the judgment of the Court, said (page 374):

"It has been very justly observed at the bar, that the Court is bound to take notice of public facts and geographical positions;

and that this remote part of the country has been infested, at different periods, by smugglers, is a matter of general notoriety, and may be gathered from the public documents of the government."

We know in this way that Grand Rapids is about 152 miles from Detroit and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids, i. e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whiskey to the officers which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids where they plied their trade. That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey* v. *Emery*, 97 U. S. 642, 645, a suit for damages for seizure by a collector this Court defined probable cause as follows:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

Locke v. *United States*, 7 Cranch, 339; *The George*, 1 Mason, 24; *The Thompson*, 3 Wall. 155. It was laid down by Chief Justice Shaw, in *Commonwealth* v. *Carey*, 12 Cush. 246, 251 that "if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." *Commonwealth* v. *Phelps*, 209 Mass. 396; *Rohan* v. *Sawin*, 5 Cush. 281, 285. In *McCarthy* v. *De Armit*, 99 Pa. St. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

"The substance of all the definitions is a reasonable ground for belief in guilt."

In the case of the *Director General* v. *Kastenbaum*, 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 28):

"But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable."

See also *Munn* v. *De Nemours*, 3 Wash. C. C. 37.

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without sub-

stance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aside on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the Government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is

Affirmed.

Mr. Justice McKenna, before his retirement, concurred in this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1924.

George Carroll and John Kiro, Plaintiffs in Error, *vs.* The United States.	In Error to the District Court of the United States for the Western District of Michigan.

[March 2, 1925.]

The separate opinion of Mr. Justice McReynolds.

1. The damnable character of the "bootlegger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. "To press forward to a great principle by breaking through every other great principal that stands in the way of its establishment; . . . in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice." Sir William Scott, *The Le Louis*, 2 Dodson 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by Federal officers without a warrant and upon mere suspicion—ill founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act (c. 85, 41 Stat. 305). They maintain that both arrest and seizure were unlawful and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: *Crowell* v. *M'Fadon*, 8 Cranch 94, 98; *United States* v. *1960 Bags of Coffee*, 8 Cranch 398, 403, 405; *Otis* v. *Watkins*, 9 Cranch 339; *Gelston* v. *Hoyt*, 3 Wheat. 246, 310, 318; *Wood* v. *United States*, 16 Pet. 342; *Taylor* v. *United States*, 3 How. 197, 205. They turned upon express provisions of applicable Acts of Congress; they did not involve the point now presented

and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

Whether the officers are shielded from prosecution or action by Rev. Stat. Sec. 970 is not important. That section does not undertake to deprive the citizen of any constitutional right or to permit the use of evidence unlawfully obtained. It does, however, indicate the clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether by apt words Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. First and second violations are declared to be misdemeanors—nothing more—and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a first offense, we come to inquire whether such authority can be inferred from its provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. *United States* v. *Harris*, 177 U. S. 305, 310. And the well settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. *Moffitt*, 115 U. S. 487, 498—"By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."

Elk v. *United States*, 177 U. S. 529, 534—"An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."

Commonwealth v. *Wright*, 158 Mass. 149, 158—"It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that therefore an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute. . . . The Legislature has often empowered officers to arrest without a warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law."

Pinkerton v. *Verberg*, 78 Mich. 573, 584—"Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. . . . If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer."

3. The Volstead Act contains no provision which annuls the accepted common law rule or discloses definite intent to authorize arrests without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view Section 26 is relied upon—

> "When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, is shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance and shall arrest any person in charge thereof."

Let it be observed that this section has no special application to automobiles; it includes *any* vehicle—buggy, wagon, boat or air craft. Certainly, in a criminal statute, always to be strictly construed, the words "shall discover . . . in the act of transporting in violation of the law" cannot mean, shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things. Since the beginning apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged; and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following: "An Act to regulate the collection of duties on imports and tonnage," approved March 2, 1789, c. 22, 1 Stat. 627, 677, 678; "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels," approved August 4, 1790, c. 35, 1 Stat. 145, 170; "An Act further to provide for the collection of duties on imports and tonnage," approved March 3, 1815, c. 94, 3 Stat. 231, 232. These and similar Acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

"An Act supplemental to the National Prohibition Act," approved November 23, 1921, c. 134, 42 Stat. 222, 223, provides—

> "That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment."

And it is argued that the words and history of this section indicate the intent of Congress to distinguish between the necessity for

warrants in order to search private dwellings and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches and distinguished between them by declaring the former criminal. But the connection between this distinction and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is valid, and so are some seizures. But what of it? The Act made nothing legal which theretofore was unlawful, and to conclude that by declaring the unauthorized search of a private dwelling criminal Congress intended to remove ancient restrictions from other searches and from arrests as well, would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures, unreasonableness often depends upon the means adopted. Here the seizure followed an unlawful arrest, and therefore became itself unlawful—as plainly unlawful as the seizure within the home so vigorously denounced in *Weeks* v. *United States*, 232 U. S. 383, 391, 392, 393.

In *Snyder* v. *United States*, 285 Fed. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine: "That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty

of the defendant. That it happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful."

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In *Weeks* v. *United States, supra,* through Mr. Justice Day, this court said: "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385, 391: "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to

call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States,* 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Gouled v. *United States,* 255 U. S. 298, and *Amos* v. *United States,* 255 U. S. 313, distinctly point out that property procured by unlawful action of Federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal, and violated the guarantee of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest and was therefore obtained in violation of their constitutional rights. Articles found upon or in the control of one lawfully arrested may be used as evidence for certain purposes, but not at all when secured by the unlawful action of a Federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwelt, chief prohibition officer. His entire testimony as given at the trial follows—

> "I am in charge of the Federal Prohibition Department in this District. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes Street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name

of Kruska, George Kiro and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whisky, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three-quarters of an hour; that they had to go out to the east end of Grand Rapids, to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the sixth day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th day of October it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing.

"On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said 'there goes the Carroll brothers,' and we went on still further in the same direction we were going and turned around and went back to them; drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me and called me by the name of 'Fred' just as soon as I got up to him. Raised up the back part of the

roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there;' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor and give us one more chance and I will make it right with you.' At the same time he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a ten dollar bill and there was some other bills; I don't know how much there was; it wasn't a large amount.

"As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the Marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits 'A' and 'B'.

"Q. Now, those two bottles, Exhibits 'A' and 'B', were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it got up here?

"A. We didn't label them out on the road; simply found it was liquor and sent it in; and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there. Mr. Johnson and I sealed the bottles and Mr. Johnson's name is on the label that goes over the bottle with mine, and this liquor was taken out of the case today. It was taken out for the purpose of analyzation. The others were not broken until today.

"Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car? A. It has the appearance of it, yes sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car.

"[Cross-examination.] I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car

and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately.

"Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir.

"Q. And took possession of it, arrested them, and brought them in? A. Yes, sir.

"Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge that this car was coming through at that particular time.

"[Redirect examination.] The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whisky in one lazyback."

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came two and a half months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion it has been careful to say so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me it seems clear enough that the judgment should be reversed.

I am authorized to say that Mr. Justice SUTHERLAND concurs in this opinion.